



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



**HARVARD LAW SCHOOL
LIBRARY**

June 11 1902

REPORTS

29

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 191.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN JUNE AND
OCTOBER, 1901, AND CASES IN WHICH REHEARINGS
WERE DENIED AT THE OCTOBER TERM, 1901.

ISAAC NEWTON PHILLIPS,
REPORTER.

SPRINGFIELD:
1902.

Entered according to Act of Congress, in the year 1902, by
ISAAC NEWTON PHILLIPS,
In the Office of the Librarian of Congress at Washington.

Rec. Feb. 13, 1902.

*Pantograph Printing and Stationery Co.
Printers, Stereotypers, Binders,
Bloomington, Ill.*

JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JACOB W. WILKIN, CHIEF JUSTICE.

BENJAMIN D. MAGRUDER,	}	JUSTICES.
JOSEPH N. CARTER,		
JAMES H. CARTWRIGHT,		
CARROLL C. BOGGS,		
JOHN P. HAND,		
JAMES B. RICKS,		

ATTORNEY GENERAL,
H. J. HAMLIN.

REPORTER,
ISAAC NEWTON PHILLIPS.

CLERK FOR THE SOUTHERN GRAND DIVISION,
OLIVER J. PAGE.

CLERK FOR THE CENTRAL GRAND DIVISION,
ALBERT D. CADWALLADER.

CLERK FOR THE NORTHERN GRAND DIVISION,
CHRISTOPHER MAMER.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.		PAGE.
Agnew <i>ads.</i> Supple.....	439	Chicago, City of, v. Lut-	
Ahern <i>ads.</i> Globe Mutual Life		hardt.....	516
Ins. Ass.....	167	Chicago General Ry. Co. v.	
Anderson v. Anderson.....	100	Sellers.....	524
Armour v. Brazeau.....	117	Christian, County of, v. Mer-	
Auger v. Tatham.....	296	rigan.....	484
		Cline v. Patterson.....	246
B		Cohn <i>ads.</i> Gardner.....	553
Bacon v. National German-		Crane v. Eddy	645
American Bank of St. Paul	205	Crane Co. <i>ads.</i> Mallers.....	181
Ballance v. Vanuxem.....	319		
Berkenfield v. People.....	272	D	
Binns v. LaForge.....	598	Davis v. Lusk.....	620
Blanchard v. Blanchard....	450	Davis <i>ads.</i> Mathewson.....	391
Bliss v. Seeley.....	461	Davis v. Upham & Stone....	372
Bloomer <i>ads.</i> Deen.....	416	Deen v. Bloomer.....	416
Booth & Co. v. Raymond....	351	Dietz <i>ads.</i> Lang.....	161
Borland <i>ads.</i> Siegel.....	107	Doyle <i>ads.</i> Robson.....	566
Bowerman v. Sessel.....	651	Drainage District <i>ads.</i> Peo-	
Boyden & Son <i>ads.</i> Merritt..	136	ple <i>ex rel.</i>	623
Brazeau <i>ads.</i> Armour	117	Drew <i>ads.</i> First Nat. Bank of	
Browne v. Siegel, Cooper &		Sterling	186
Co.....	226	Duffy <i>ads.</i> Elgin, Joliet &	
Burwell <i>ads.</i> Hawkins	389	Eastern Ry. Co.....	489
C		E	
Canal Comrs. v. Sanitary		Eddy <i>ads.</i> Crane	645
District of Chicago.....	326	Elgin, Joliet & Eastern Ry.	
Central Ry. Co. v. Knowles.	241	Co. v. Duffy.....	489
Chapman v. Cheney	574		
Cheney <i>ads.</i> Chapman	574	F	
Chicago, City of, <i>ads.</i> Gage.	210	First Nat. Bank of Peoria v.	
Chicago, City of, <i>ads.</i> Hous-		Peoria Watch Co.....	128
ton.....	559	First Nat. Bank of Sterling	
		v. Drew.....	186

	PAGE.	L	PAGE.
Fishback v. People <i>ex rel.</i> ...	171	LaForge <i>ads.</i> Binns.....	598
Foreman Shoe Co. v. Lewis		Lang v. Dietz.....	161
& Co.....	155	Lempke <i>ads.</i> Goss Printing	
Foster v. St. Luke's Hospital	94	Press Co.....	199
Foulks <i>ads.</i> Illinois Central		Lennartz v. Quilty.....	174
R. R. Co.....	57	Lewis v. McGrath.....	401
		Lewis & Co. <i>ads.</i> Foreman	
G		Shoe Co.....	155
Gage v. City of Chicago...	210	Lusk <i>ads.</i> Davis.....	620
Gardner v. Cohn	553	Luthardt <i>ads.</i> City of Chi-	
German Alliance Ins. Co. v.		cago	516
VanCleave.....	410		
Gibson <i>ads.</i> Peterson.....	365	M	
Globe Mutual Life Ins. Ass.		Magee <i>ads.</i> Standard Oil Co.	84
v. Ahern.....	167	Mallers v. Crane Co.....	181
Goss Printing Press Co. v.		Mathewson v. Davis.....	391
Lempke.....	199	McCrea <i>ads.</i> Iroquois Fur-	
Graver Tank Works v. O'Don-		nace Co.....	340
nell.....	236	McGahan v. People <i>ex rel.</i> ...	493
		McGrath <i>ads.</i> Lewis.....	401
H		Merrigan <i>ads.</i> County of	
Harrison <i>ads.</i> People <i>ex rel.</i> ..	257	Christian	484
Hawkins v. Burwell.....	389	Merritt v. Boyden & Son ...	136
Heath & Milligan Co. <i>ads.</i> -		More v. More	97
National Linseed Oil Co... 75		Morse v. Pacific Ry. Co. 371, 356	
Hess <i>ads.</i> Huber	305		
Higley <i>ads.</i> Summers	193	N	
Houston v. City of Chicago. 559		National German-American	
Huber v. Hess.....	305	Bank <i>ads.</i> Bacon.....	205
Huffman v. Sharer.....	79	National Linseed Oil Co. v.	
Hutchinson <i>ads.</i> North Chi-		Heath & Milligan Co.....	75
cago Street R. R. Co.....	104	North Chicago Street R. R.	
		Co. v. Hutchinson	104
I			
Illinois Central R. R. Co. v.		O	
Foulks	57	O'Connell v. O'Conor.....	215
Illinois Central R. R. Co. v.		O'Conor <i>ads.</i> O'Connell.....	215
Johnson.....	594	O'Donnell <i>ads.</i> Graver Tank	
Iroquois Furnace Co. v. Mc-		Works	236
Crea	340		
		P	
J		Pacific Ry. Co. <i>ads.</i> Morse. 371, 356	
Johnson <i>ads.</i> Illinois Central		Patterson <i>ads.</i> Cline.....	246
R. R. Co.....	594	People <i>ads.</i> Berkenfield....	272
		People <i>ex rel.</i> v. Drainage	
K		District.....	623
Knowles <i>ads.</i> Central Ry. Co. 241		People <i>ex rel.</i> <i>ads.</i> Fishback. 171	
Krasa v. Sroelowitz.....	249		

	PAGE.		PAGE.
People <i>ex rel.</i> v. Harrison...	257	Sroelowitz <i>ads.</i> Krasa.....	249
People <i>ex rel. ads.</i> McGahan.	493	Sroelowitz <i>ads.</i> Schultz.....	249
People, use, etc. v. Petrie..	497	Standard Oil Co. v. Magee..	84
People, use, etc. <i>ads.</i> Salomon.	290	State Board of Equalization	
People <i>ex rel. ads.</i> State Board		v. People <i>ex rel.</i>	528
of Equalization.	528	State Board of Health v.	
People <i>ex rel.</i> v. Whidden....	374	Ross.....	87
Peoria Watch Co. <i>ads.</i> First		St. Louis & Belleville Elec.	
Nat. Bank of Peoria.....	128	Ry. Co. v. VanHoorebeke ..	633
Peterson v. Gibson.....	365	St. Luke's Hospital <i>ads.</i> Fos-	
Petrie <i>ads.</i> People, use, etc.	497	ter.....	94
Pyott v. Pyott.....	280	Summers v. Higley.....	193
		Supple v. Agnew.....	439
Q		T	
Quilty <i>ads.</i> Lennartz.....	174	Tatham <i>ads.</i> Auger.....	296
R		Tolman v. Salomon.....	202
Raymond <i>ads.</i> Booth & Co... 351		Towne v. Towne.....	478
Robinson v. Ruprecht.....	424	Trustees of Schools <i>ads.</i>	
Robson v. Doyle.....	566	Whitlow.....	457
Ross <i>ads.</i> State Board of		U	
Health.....	87	Upham & Stone <i>ads.</i> Davis..	372
Roth <i>ads.</i> Watson.....	382	V	
Ruprecht <i>ads.</i> Robinson	424	VanCleave <i>ads.</i> German-Alli-	
S		ance Ins. Co.....	410
Salomon v. People, use, etc.	290	VanHoorebeke <i>ads.</i> St. Louis	
Salomon <i>ads.</i> Tolman.....	202	& Belleville Elec. Ry. Co..	633
Sanitary District of Chi-		Vanuxem <i>ads.</i> Ballance.....	319
cago <i>ads.</i> Canal Comrs... 326		W	
Schultz v. Sroelowitz.....	249	Watson v. Roth.....	382
Scott v. Scott.....	628	West Chicago Street R. R.	
Seeley <i>ads.</i> Bliss.....	461	Co. <i>ads.</i> Williams.....	610
Sellers <i>ads.</i> Chicago General		Whidden <i>ads.</i> People <i>ex rel.</i> ..	374
Ry. Co.....	524	Whitlow v. School Trustees.	457
Sessel <i>ads.</i> Bowerman.....	651	Williams v. West Chicago	
Sharer <i>ads.</i> Huffman.....	79	Street R. R. Co.....	610
Siegel v. Borland.....	107		
Siegel, Cooper & Co. <i>ads.</i>			
Browne.....	226		

MARSHALL DAY CELEBRATION.

The centennial anniversary of the installation of JOHN MARSHALL as chief justice of the United States was celebrated before the Supreme Court of Illinois, under the auspices of the Illinois State Bar Association, at Springfield, on the fifth day of February, 1901. This day was chosen for the reason that the court could not be in session upon Monday, February 4. The term having convened, Judge Jesse Holdom, of Chicago, president of the Illinois State Bar Association, addressed the court, as follows:

May it please the court—We are assembled here to-day to do honor to the memory of JOHN MARSHALL,—soldier, statesman, diplomat, jurist,—and to celebrate the centennial anniversary of his installation in the Supreme Court of the nation as chief justice of the United States,—the most exalted judicial position in this republic. This celebration is, with the generous sanction of this tribunal, held in the presence of this court in the capitol building of our State, under the auspices of the Illinois State Bar Association, and like exercises have been held throughout the length and breadth of this land and participated in by courts and lawyers, supplemented with the attendance of thoughtful citizens as attentive hearers of the eloquent words which have been voiced in his praise.

It is a matter of no little pride to know that this great outpouring of respect and homage to the memory of the "Expounder of the Constitution" was first made possible by the action of the Illinois State Bar Association, and that the initial idea originated with Mr. Adolph Moses, one of its members; that under a resolution passed at its annual meeting in 1899, a committee was appointed to present the subject of such a celebration to the American Bar

Association. The labors of that committee were rewarded with success, and a national committee was appointed by the American Bar Association at its annual convention in 1899, clothed with authority to make suitable arrangements for the general observance of the centennial anniversary. No anniversary has ever been more generally observed than that of February 4, 1901.

We of Illinois have an additional interest and pride in this celebration in the fact that the seat of the great chief justice has been for the past ten years filled by Melville W. Fuller, a citizen of this State, whose name is enrolled as an attorney of this court, whose eloquent voice has often been heard within these walls in the argument of important legal causes. He also sat in the old State capitol as a member of the House of Representatives, and has left his impress in the formation of the early statutes of this State.

In honor of the day and the event commemorated, all the courts of the country, with some few insignificant exceptions, stood adjourned from the transaction of legal affairs.

We are highly favored in having with us as the orator of the day a native of the State of Washington and Marshall; a jurist who has expounded the laws and the constitution as chief justice of a court of *dernier resort* in a sister State; a statesman who has a seat in the most distinguished legislative body known to our time; a gentleman of learning and culture; an orator of national reputation; a kindly, generous man, who has traveled from the nation's capital to the home of the great Lincoln to afford us the pleasure of hearing his eloquent tribute to the memory of JOHN MARSHALL. I have the honor—and it gives me more pleasure than I can find suitable words to express—to present to this court as the orator of the day, Senator William Lindsay, of the State of Kentucky, whose theme is "JOHN MARSHALL."

Senator Lindsay then delivered the following oration:

For the honor of appearing in this august and dignified presence, and for the opportunity of addressing this distinguished audience, I owe the Bar Association of Illinois my most profound thanks.

We do not meet to celebrate the services of a great military chieftain or the triumphs of a successful political leader. In the common acceptance of the term, JOHN MARSHALL was neither a hero nor a leader of the people. He was never the idol of the day. His life and labors were not on lines that excited enthusiasm or

challenged popular applause; but combining his personal characteristics, his services and the grandeur of their results, he typified, as few men have done, the fact that "Peace hath higher tests of manhood than battle ever knew." A country lawyer, without ambition for personal advancement, he avoided office and accepted public trust only from a sense of duty. In the walks of his profession he ripened, unostentatiously and gradually, into one of the profoundest jurists of his day, and, as opportunity came and occasion demanded, proved himself among the greatest judges of modern times.

It was said by Socrates that "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially;" and by Locke, "He that judges without informing himself to the utmost that he is capable cannot acquit himself of judging amiss." These tests, each and all, may be applied to JOHN MARSHALL, and his judicial career failed in no respect to meet them in letter and in spirit.

The world has builded monuments to her rulers and to her soldiers; the books are full of eulogies of statesmen and of tributes to those who have distinguished themselves in the walks of literature and science; but in all history there is not a parallel to the demonstrations of yesterday and to-day, in memory of a man who, during the life of a generation, almost withdrawn from the gaze of the world, wrought out a work which is to endure as long as the American people shall cherish free institutions and constitutional government shall be preserved.

Respect for the American theory of liberty regulated by law, inspired the thought of "JOHN MARSHALL DAY," and invoked the movement resulting in the numberless demonstrations in honor of the American judge who pointed the way through which supreme authority may be freely exercised while constitutional limitations continue to be observed. The lessons these demonstrations teach are incalculable in value as they are elevating and ennobling in results. The good, the great and the useful in the fields of beneficent action would live in vain if the memory of their deeds should be permitted to fade into dim forgetfulness.

We are told by Carlyle, in his inimitable style, that "Great men, taken up in any way, are profitable company. We cannot look even imperfectly upon a great man without gaining something by him. He is the living light fountain, which it is good and pleasant

to be near; the light which enlightens—which has enlightened—the darkness of the world; and thus, not as a kindled lamp only, but rather as a natural luminary shining by the gift of heaven; a flowing light fountain * * * of nature, original insight of manhood and heroic nobleness, in whose radiance all souls feel that it is well with them."

In this spirit we take up JOHN MARSHALL. With this sentiment we look on his history, and, contemplating the record of his deeds, see him as though he were yet a living, moving, controlling factor in the affairs of men. We cannot look on him even thus imperfectly without gain, or fail to realize that the light which, two generations ago, was enkindled through him in the realms of constitutional law and of international and municipal jurisprudence, still shines with undiminished vigor. Judges and lawyers, statesmen and politicians, the learned of all classes of society, feel to-day, as they never felt, that it is good to contemplate JOHN MARSHALL and pleasant to be near the light he left burning when his mortal career was closed, which light will continue to illumine the judicial way as long as American institutions shall live.

Up to his appointment to be chief justice of the Supreme Court of the United States, JOHN MARSHALL'S career had not been marked by services sufficiently exceptional to attract to him the public attention his personal worth and capacity deserved. His earlier manhood was spent in the formative period of the republic—an age abounding in men of eminence and distinction. His opportunities were limited, and his native modesty obscured for the time his intellectual and moral greatness. A minute man in 1775, a lieutenant in the continental line in 1776, a captain in 1777, he participated in the battles of Brandywine, Germantown and Monmouth, and shared the privations and hardships in the winter which gave to Valley Forge its historic interest. Retiring from active participation in the war of the revolution when his services could no longer be profitably utilized, he turned his attention to the profession in which, in the course of events, he was to achieve the most unexampled success.

He began his professional life in Richmond, the metropolis of the then leading American commonwealth. He served his State in its legislature, and was a member of the convention through which Virginia ratified the Federal constitution. Convinced by experience that under the articles of confederation the general

government was utterly inadequate, he advocated a supreme authority perfectly and efficiently organized. He was an earnest advocate of the ratification of the plan proposed by the convention over which Washington presided and of which Madison was a leading member. He realized that the confederation was approaching its dissolution and then had but a nominal existence. He acted with Washington, Madison, Randolph, Nicholas, and their associates, unmoved by the eloquence of Henry and unawed by the predictions of those who could see, or supposed they could see, in the adoption of the constitution the ultimate destruction of the States and the centralization of all power in the Federal government. He appreciated the necessity for and earnestly advocated the creation of a government possessing the power not only to make treaties, but to compel their performance; to lay taxes and enforce their collection; borrow money and provide for its payment; regulate commerce with foreign nations and among the States; establish and support post-offices and post roads; raise and support armies; provide and maintain a navy, and do and perform all those indispensable acts and things for which provision had been apparently made by the articles of confederation, but which the central government was without the means of doing or performing. He did not fear that the independent, and, in some respects, omnipotent, judiciary, to be called into existence by the constitution, would place the Federal government above and beyond the control of the people. On the contrary, he believed that the great powers of the judiciary were indispensably necessary for the protection of the people against the abuse of authority by the legislative and executive departments.

It is hardly possible, though he may have looked forward to the time when, under his leadership as its first officer, the Supreme Court would demonstrate that judicial power which extends to all cases, in law and equity, arising under the constitution and laws of the United States, and under treaties made or which might be made under their authority; to all classes of admiralty and maritime jurisdiction; to controversies to which the United States might be a party, and to controversies between two or more States, was among the most conservative and republican features of the new plan of government.

At the close of the Virginia convention Mr. MARSHALL returned to the practice of his profession and industriously pursued it for

a period of ten years, with occasional intervals of service in the legislature of his State. In 1797, with Mr. Pinckney and Mr. Gerry, he visited France to attempt the adjustment of questions then threatening to disturb our relations with our ancient friend and ally. The mission failed, but JOHN MARSAHLL returned with an increased reputation for dignity, ability and learning. Soon after, he was elected to Congress, and became a member in December, 1799. In the meantime he had declined a proffered seat on the Supreme bench. In May, 1800, he was offered the place of Secretary of War. Before the end of the year he was made Secretary of State, and January 31, 1801, was appointed chief justice of the United States. If his career had then terminated, his name would have gone down in history with the honor and respect attending those who, standing above their fellows in moral and intellectual greatness, have met responsibilities with unfaltering courage, and discharged the duties of life with that conscientious devotion which distinguishes the patriotic citizen and embellishes the character of the christian gentleman. Fortunately for his country and for future ages, the chief justice was given yet thirty-four more years of life. By his genius and learning he explored the mysteries of the Federal constitution and brought to the light of day the hidden wisdom that lay concealed within its bosom.

It is a common remark that to him we are indebted for the constitution; that he was not merely its expounder, but its author and creator; that he raised it from a doubtful experiment to a harmonious, permanent and beneficent system of government. This is at once mistaken eulogy and misdirected praise. With the conception and preparation of the plan of government embodied in the constitution he had no direct or immediate connection. He was in no sense the author or creator of the plan. The constitution, with its marvelous virtues and possibilities, was the product of compromise and concession. It was not what any member of the convention would have made it, and probably demanded the unqualified approval of no one of the distinguished men who eventually signed it. It came in obedience to inexorable necessity, and would not have been adopted but for the conviction that its rejection would precipitate a catastrophe the consequences of which no one could foresee. The chief justice recognized that it was his duty to interpret, to construe,—not to create,—the constitution, and that he had no right to add to or subtract from its most unim-

portant provision. Courts have no concern with the constitution except to discover its meaning, and to apply that meaning to the causes that from time to time come before them for adjudication.

No one realized or appreciated these truths more sensibly than Chief Justice MARSHALL, and no judge more conscientiously refrained from the creation of either constitutional or statutory law. He came to a work original and unexampled in its character and importance. The time during which the constitution had been in force before his induction into office had been barely sufficient for the organization of the judicial system. But few constitutional questions had been passed on by the Supreme Court. I quote from an eminent lawyer, a cotemporary and personal friend of the chief justice: "At the date of his appointment the constitution had been more frequently discussed in deliberative assemblies than in the Supreme Court of the United States. Circumstances had not yet called for the intervention of that court upon questions opening the whole scheme of the constitution and thereby determining the rules for its interpretation, nor had anything of previous occurrence established the meaning of some of the most important provisions which restrained the powers of the constitution. * * * It is true of the time when this appointment was made, that in many parts of the greatest difficulty and delicacy it had not then received judicial interpretation."

At the close of the administration of the elder Adams party spirit had reached its climax. Differences in politics so far obscured the ancient relations of personal friendship between the outgoing and incoming Presidents that its affectionate character was not restored until old age had mellowed in each the resentments of party antagonisms. Adams retired from office under a cloud of unpopularity which we of to-day find it impossible to comprehend. The new chief justice, his supporter and appointee, inherited a full share of the bitterness that had been poured on the head of the administration.

JOHN MARSHALL had never been partial to Thomas Jefferson and had no sympathy with his opinions or policies. Jefferson regarded MARSHALL'S theories of government as hostile to the local supremacy of the States and dangerous to liberal institutions. No two men did more to develop and direct constitutional government, but in working out the great problem neither disguised his hostility to or his want of respect for the other. Jefferson's friends com-

plained that the opinion in *Marbury v. Madison* was an extra-judicial attack on the President, and in view of the adjudged want of jurisdiction in the court there was apparent foundation for the complaint. On the other hand, the rulings of the chief justice in the trial of Aaron Burr were made the pretext for organized calumny and abuse, admitting neither excuse nor extenuation.

Repelling insinuations made in argument by counsel representing the government, the chief justice took advantage of his charge to the jury in that case to pronounce these memorable words: "Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly, but which may perhaps not improperly receive some notice. That this court dares not usurp power is most true. That this court dares not shrink from its duty is none the less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the particular object of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom; but if he has no choice in the case—if there is no alternative presented to him but dereliction of duty or the opprobrium of those who are denominated the world—he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

This was not the wall of a man appealing for temperate consideration or for justice, but the defiance of a judge whose courage and fortitude were equal to his sense of duty, and whose resolution was that, so far as he was concerned, the law should be vindicated though its minister be sacrificed. It was responsive to the injunction from on high to those who sit in judgment, "Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man."

The key of JOHN MARSHALL'S character was that he was not "afraid of the face of man." His sublime courage, his discriminating judgment, his judicial temperament, his directness and simplicity of statement, his irresistible and irrefutable logic, combined to prepare him for the position he ultimately reached in public estimation—the first and the greatest interpreter and expounder of the Federal constitution and of the checks and balances of the complex system of government resulting from its adoption.

The cases in which he established for himself the reputation of the greatest constitutional lawyer of the country did not reach

the court of final resort until time had tempered the acerbity of party controversy and personal antagonisms had measurably passed into oblivion. The people had virtually become all republicans and all federalists in their devotion to constitutional government. The harmony of social intercourse appealed for by Mr. Jefferson in his first inaugural address had been restored, and the courts approached the consideration of questions arising under the Federal constitution with the calmness and deliberation their dignity and importance required. The time came for the discussion of the constitution in the tribunal clothed with the power and charged with the duty of its authoritative exposition. The nature and extent of the powers delegated to the general government and the limitations imposed by the constitution on the States ceased to be mere matters of popular or academic controversy. They became practical issues, affecting not only State and Federal officials in the discharge of their respective duties, but the industrial and business pursuits of the people.

The States were naturally jealous of the importance of the Federal government, and impatient on account of the restraints the constitution imposed on their original powers. State officials were reluctant to abandon the exercise of authority which a few short years before was undisputed, and resented the claim that there were other limitations than those plainly and expressly set out in the covenant through which the "more perfect union" had been instituted. Two theories of constitutional construction were kept before the country by those who, on the one hand, were inclined to magnify the powers and importance of the central authority, and those who, on the other, insisted that, at the most, the constitution was but a league between sovereign States and the Federal government,—but the common agent of the original sovereigns.

The utilization of steam as a practical motive power gave occasion for the great case of *Gibbons v. Ogden*, involving the fundamental question whether New York could constitutionally grant to certain named individuals the exclusive right to navigate the waters of that State by vessels propelled by steam. Speaking for the court, the chief justice announced a decision that for more than eighty years has successfully stood the tests of hostile criticism. For clearness of statement, for irresistible argument, as a specimen of legitimate interpretation and of comprehensive

analysis, the opinion of the court remains unexcelled in the literature of constitutional law. In the consideration of the relative authority claimed for the Federal and State governments, respectively, over questions of commerce among the States, the court, in language luminous and convincing, if not conclusive, thus announced the rule of constitutional interpretation:

"As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government; when they converted their congress of ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected. This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the

general views and objects of the instrument,—for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent,—then we cannot perceive the propriety of this strict construction nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

Eight years before, (MARSHALL then being chief justice,) in *Martin v. Hunter*, in an opinion by Justice Story, the court held that "the government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms it is not to be restrained to particular cases, unless that construction grows out of the context, expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

The excuse I offer for these copious extracts is the recognized difficulty of abbreviating that which MARSHALL and Story have reduced to the last analysis, and the impossibility of stating with their accustomed clearness and perspicuity the fundamental rules of interpretation which, under the leadership of the chief justice, the court of ultimate resort has applied, and continues to apply, to that supreme law, in the light of and in conformity to which all other laws, State and national, are to be read, expounded and administered.

Interpretation, exposition and construction. This was the work to which MARSHALL gave his great powers, with the most unsparing labor. He invented no new rules of interpretation. He resorted to no strange or hitherto unknown canons of construction. Artificial reasoning was as foreign to his nature as was the fear of adverse criticism when declaring the conviction to which patient investigation and sound judgment pointed the way. With him as its chief, the great court brushed aside the phantom of judicial encroachment on legislative functions which some of those who opposed the adoption of the constitution had vigorously pressed on the attention of the people.

In the first case in which the court (after MARSHALL became chief justice) adjudged the invalidity of a congressional enactment as outside of constitutional warrant, it also declined to exercise the jurisdiction the invalid statute had attempted to confer. To the question whether an act of Congress repugnant to the constitution binds the court and obliges them to give it effect, it was answered that "if a law be in opposition to the constitution,—if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law,—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to an ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply." This answer seems axiomatic to the lawyer of to-day, but it did not appear so to the lawyer of a hundred years ago.

In 1785 the legislature of Rhode Island impeached the judges of that State for their temerity in refusing to enforce unconstitu-

tional legislation, and in 1807 and 1809 Ohio judges were impeached for a like offense. Patrick Henry, in the Virginia convention, expressed doubt as to whether the Federal judiciary would have the courage to declare congressional legislation unconstitutional. Speaking for the Virginia judges who had done so, he exclaimed: "Yes, sir; our judges opposed the acts of the legislature. We have this land-mark to guide us. They had the fortitude to decree that they were the judiciary, and they oppose unconstitutional acts. Are you sure that your Federal judiciary will act thus? Is that judiciary so well constituted and so independent of other branches as our State judiciary? Where are your land-marks in this government? I will be bold to say that you cannot find any. I take it as the highest encomium on this country that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

A quiet and unobtrusive Richmond lawyer who sat in that Virginia convention—a colleague of the eloquent Henry—fifteen years later established the land-marks inquired for, and proved to the country that the Federal judiciary was so well constituted that it had the fortitude and courage to oppose unconstitutional legislation, and, better still, the moderation and forbearance to decline jurisdiction not conferred by the constitution, and which Congress, though it might proffer, had no authority to confer.

Asserting the power and duty of opposing Congress when the constitution so required, the Supreme Court set the example of restraining itself, and confidence, though said to be a plant of slow growth, soon became the connecting link between the people and that high tribunal. Convinced that the judiciary was the guardian of the constitution, and that in consequence of such guardianship the government of the Union is a government of laws and not of men, confidence ripened into respect and admiration, and the Supreme Court insensibly secured and assumed the position intended for it by the framers of the constitution. It took its place as a co-ordinate department of government, with a hold on the people as strong as that of any other department. This hold has been maintained through all the changes, all the upheavals and all the trying contests of the century which has just been transformed into "the eternal landscape of the past."

It is not fair to say that the court had failed in securing public confidence up to the advent of JOHN MARSHALL as its chief justice. It is not, however, unfair or unjust to say that public attention

had not been specifically directed to its field of labor, and that the litigation it had theretofore considered had not been of the character and importance to attract general public notice, in the face of the political interests excited by the law-making department and the personal consideration enjoyed by the eminent men who had occupied the chief executive office of the Union.

From February 4, 1801, till his death, on July 6, 1835, as far as it was possible, JOHN MARSHALL sank his personality in the court of which he was the presiding justice. As a public character he was no longer one of the people. As the chief justice he was the concrete representative of the law. Through him, and through the great court of which he was the acknowledged leader, the law of the land day by day pronounced its judgments, and before he was called to his eternal rest the constitution, which at the beginning appeared an undeveloped skeleton, took on the form of consistence, beauty and harmony, and from an apparently tongueless automaton became a breathing, speaking and directing potentiality.

Viewed from our present standpoint, we see that the constitution, as the plan of government, is as remarkable for its arrangement of subjects as for the concise and appropriate language in which the will of the people is expressed. It was happily said on a great occasion by David Dudley Field, that there is scarcely another instrument to which the rule *noscitur a sociis* can be better applied for its interpretation. This rule the chief justice and his associates for thirty-four years applied with undeviating fidelity and comprehensive intelligence. From *Marbury v. Madison* to *Baron v. Baltimore*, (the last case in which the chief justice, as the organ of the court, discussed a constitutional question,) the work, not of creation but of development, steadily progressed in the manifestation of the true character and capabilities of the plan of government which, at the time of its adoption, was understood and appreciated by scarcely a tithe of those who participated in its creation.

It would be out of place to attempt, and the occasion will not permit, an exhaustive review of the connection of the chief justice with our judicial system or of his labors in harmonizing and developing that system. He was a party man but not a partisan. He distinguished clearly between principles and policies. A federalist of the school of Washington, he was as moderate in the expression of his views as he was steadfast and inflexible in defend-

ing them. Popular clamor could neither move him from the line of duty as he saw it, nor seduce him into a course that did not commend itself to his judgment and his conscience. He and his associates on the Supreme bench were not the favorites of the administration that came into power a month after he assumed the office of chief justice. If for thirty-five years the national executive and the national legislature were not the unfriendly critics of the court they certainly were not its partisans or apologists. It is probably better for the country and for the court that such was the case. Opposition promoted the independence of the individual judges and tended to define and establish the extent of judicial authority, and to mark the lines of judicial duty with technical accuracy and precision.

Under the leadership of MARSHALL the court rejected the dogma of strict construction, but did so without accepting or adopting its counterpart. Alexander Hamilton defines the rules of legal interpretation to be the rules of common sense adopted by the courts in the construction of laws. The deliverances of the chief justice in *Gibbons v. Ogden*, *Cohens v. Virginia*, and *Osborne v. The Bank*, afford striking examples of the application of common sense in the interpretation of the organic law. To say that "men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey," and that the makers of the constitution "must be understood to have employed words in their natural sense and have intended what they have said," joins conviction with simplicity, and appeals directly to the common sense of the layman as well as the lawyer, and of the uncultured man as well as the scholar. Such rules do not conflict in principle with Mr. Jefferson's rule, that on every question of constitutional construction we should carry ourselves back to the time when the constitution was adopted and recollect the spirit manifested in the debates, instead of trying what meaning may be squeezed out of the text or invented against it, and conform to the probable one in which it was passed; nor with his other rule, that "when an instrument admits of two constructions, —the one safe, the other dangerous; the one precise, the other indefinite,—I prefer that which is safe and precise."

No one has figured in American affairs who understood better or more thoroughly appreciated the fact that "truth makes all things plain," and against the truth as Chief Justice MARSHALL

presented it, casuistry and ingenuity struggled in vain to secure a foothold. It was said by William Wirt that no one could mistake his style—"the words so completely matched the thought." The justice of this epigram is exemplified in the compendium of constitutional construction expressed by the chief justice in his dissenting opinion in *Ogden v. Saunders*: "The intention of the instrument must prevail. * * * This intention must be collected from its words. * * * Its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended. * * * Its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers." Dignified, concise and complete, the accuracy of the conclusions is equaled only by the simplicity and clearness of the statement.

The chief justice was a steadfast defender of the theory that the authority of the United States was derived from the people, but he did not agree with those who argued from this postulate that the grants were made by the people, disassociated from their relations to their individual States. When this claim was pressed on his attention he responded that "no political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people in one common mass; of consequence, when they act they act in their States."

He did not agree with those who claim that the States were never separately sovereign or individual, but independent only as members of the American Union, before, as well as after, the acceptance and adoption of the constitution. He considered the original confederation a league of sovereign and completely independent States, but held that the Union, under the constitution, created a government which, though limited in its objects, is supreme with respect to those objects. He did not differ from Mr. Jefferson's theory that "our citizens have wisely formed themselves into one nation as to others, and several States as among themselves. To the United States belong the external and mutual relations; to each State severally the care of our persons, our property, our reputation and religious freedom."

Miss Martineau, who was in Washington the last winter of the long service of the chief justice, describes him and the Supreme Court in these words: "At some moments this court presents a singular spectacle. I have watched the assemblage while the chief

justice was delivering a judgment; the three judges on either hand, gazing at him more like learners than associates. Webster, standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed and his whole countenance in that intense stillness which instantly fixes the eye of a stranger. Clay, leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box unopened in his hand, his small, gray eye and placid expression carrying an expression of pleasure, which redeems his face from its unaccountable commonness. The Attorney General, his fingers playing among his papers, his quick, black eyes and thin, tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two. Those men, absorbed in what they were listening to, thinking neither of themselves nor of each other, while they were watched by the groups of idlers and listeners around them,—the newspaper corps, the dark Cherokee chiefs, the stragglers from the far west, the gay ladies with their waving plumes, and the members of either House that had stepped in to listen,—all of these have I seen at one moment constitute one silent assemblage while the mild voice of the chief justice sounded through the court."

MARSHALL, Webster, Clay and the associate justices, the senators and representatives, the gay ladies, the newspaper men, the dark Cherokees, and the English woman who caught and preserved the picture, have long since gone to their long accounts, but the scene breaks on our eyes to-day as vividly as it appeared to those who beheld it sixty-five years ago. The mild voice of the great chief justice still sounds through the high court,—yea, through the courts of all enlightened countries,—and will continue to sound as long as wisdom and justice and reason shall travel hand in hand with the law.

The name of JOHN MARSHALL is so inseparably connected with the court over which he for so many years presided that it may not be inappropriate to consider for a moment the character and dignity of that court. Its jurisdiction, original and appellate, extends to all cases, in law and equity, arising under the constitution and laws of the United States and of treaties made under their authority; to all cases affecting ambassadors, ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between citizens of different States; between citizens of the same State claiming lands under grants of

different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. No other court compares with it in jurisdiction, power or independence. Writing concerning the Supreme Court when MARSHALL was yet the chief justice, DeTocqueville, having first referred to its general jurisdiction, continued: "In the nations of Europe the courts of justice are only called upon to try controversies of private individuals, but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances to the step of the tribunal and simply says, '*The State of New York v. The State of Ohio*,' it is impossible not to feel that the court which he addresses is no ordinary body, and when it is recollected that one of those parties represents one million and the other two millions of men, one is struck by the responsibility of the seven judges whose decision is about to satisfy or disappoint so large a number of their fellow-citizens. * * * The peace, the prosperity and the very existence of the Union are vested in the hands of the * * * judges."

For the organization and leadership of this court, with its unparalleled powers and far-reaching authority, JOHN MARSHALL seems to have been specially set apart by nature. He may not have been as deeply read in the literature of the law as some of his professional brethren or as some of his judicial associates; in statecraft he may have had his superiors; in constructive ability he was not the equal of Hamilton and as a political philosopher was inferior to Jefferson; but no man of his day,—not even Madison,—was more thoroughly imbued with the spirit of the constitution or more familiarly acquainted with the causes that led to its formation or with the ends and purposes it was intended to accomplish, or more capable of applying its provisions to the events that necessarily followed its adoption.

If it be true, as was said by one of his friends, that a truly great judge belongs to an age of political liberty and public morality and is the representative of the abstract justice of the people, it is equally true that when JOHN MARSHALL was made chief justice the age and the occasion and the great judge came together. It was said of him by an eminent Englishman that "his work of building up and working out the constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions,—judgments which, for their philosophical breadth, the luminous exactness of their

reasoning and the fine political sense which pervaded them, have never been surpassed and rarely equaled by the most famous tribunals of modern Europe or of ancient Rome. He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes; but he developed and applied this idea with so much prudence and sobriety, never treading on purely political grounds, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the constitution seemed not so much to rise under his hands to its full stature as to be gradually unveiled by him, until it stood revealed in the harmonious perfection of the form which its founders designed."

Not alone in the field of constitutional law did the chief justice excel. The novel character and the fundamental nature of the propositions involved in constitutional interpretation attracted attention that would not have been directed to a court with no authority other than that of applying and enforcing a system of jurisprudence resting on precedent and statute, and venerable alone from the traditions of the past. International law, maritime and admiralty jurisdiction, the law merchant, and all branches of municipal law, were involved, at one time or another, in the litigation disposed of while MARSHALL was on the bench. I do not need to say that the opinions of the court, and notably those prepared by the chief justice, took rank with the best that came from the most enlightened courts of the world, and were everywhere, as they yet are, received as the highest authority.

Independent of and aside from the unexampled jurisdiction necessarily following the power and duty of American judges to pass on the authority of the law-making power, MARSHALL, in the arena of pre-existing jurisprudence, rivaled Mansfield as a common law judge and surpassed Eldon as a chancellor. He was not merely a great lawyer and a great judge, but as a lawyer and judge he shone with such resplendent greatness that the world has well-nigh forgotten his accomplishments as a writer and his capacity as a statesman. He served less than six months in the Federal House of Representatives, yet at the end of that brief period was recognized as the leading member of his party and the ablest defender of the administration in power. The short time he acted as Secretary

of State gave him no opportunity to demonstrate his capacity for dealing with foreign affairs. Outraged by both France and Great Britain, the United States occupied a humiliating position. Too proud to submit to insults and too weak to resent them, they could only hope to contend with either of those nations by taking advantage of the war going on between them. Under these depressing surroundings MARSHALL still had the courage to declare that the United States did not hold themselves in any degree responsible to France or Great Britain for their negotiations with the other of those powers, and that they had repelled, and would continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood. Whether, if MARSHALL had remained in the State department, the war with Great Britain, which commenced in 1812, would have been precipitated at an earlier day, is one of those propositions about which no satisfactory opinion can be formed. Certain it is, that during Mr. Jefferson's administration, and during the first term of Mr. Madison's, we did submit to injuries not doubtful and to hostilities that could not be misunderstood.

It is not to be said that the opinions of Judge MARSHALL have never been questioned or disputed. Several of them have been modified and some virtually overruled. Many who recognize his greatness as a lawyer and his superiority as a judge decline to accede to his reasoning in some instances or to the justice of his conclusions in others. There is, however, a general—I may say almost universal—consensus of opinion that he was entitled to the position he won in public estimation as the ablest constitutional lawyer of his day and the greatest judge the country has yet produced.

The problems arising out of our late treaty with Spain have awakened a new interest in constitutional law. Students are eagerly searching the opinions of the Supreme Court rendered while MARSHALL was the chief justice, and on every hand those opinions are being patiently and laboriously investigated, with the assurance that they will shed light on the difficult questions with which the executive, legislative and judicial departments of the government are now beset. The cases of *Loughborough v. Blake* and *American Ins. Co. v. Canter*, have taken on new importance and have again become land-marks in the literature of constitutional law. Although *Loughborough v. Blake* involved the single question whether Congress had the right to impose a direct tax on the District of

Columbia, the reasoning of the decision, it is claimed, carries the constitution to the remotest confines of all the domain over which the jurisdiction of the United States may extend, however acquired, by whom peopled, and without regard to the possibilities of establishing order or maintaining peace through literal obedience to constitutional limitations.

As the converse of this proposition, it is urged that when we find the Supreme Court, as in the case of *The Cherokee Nation v. The State of Georgia*, declaring that the Indian countries are admitted to comprise part of the United States, and are so completely under the sovereignty and dominion of that government that an attempt to acquire the lands or to form political connections with the Indian tribes would be an invasion of our territory and an act of hostility to our government, and then find it declared in the case of *Worcester v. Georgia* that we have by repeated treaties recognized and treated the Indian nation as distinct political communities, having territorial boundaries within which their authority is exclusive, we are tempted to ask why those treaties have been upheld and enforced by the courts, if the constitution, *ex proprio vigore*, extends to all countries that may become subject to the dominion or jurisdiction of the United States. The great court over which JOHN MARSHALL presided and the reputation and influence of which he did so much to establish, continues to perform its duties and exercise its functions as the arbiter of final resort in all cases of constitutional difficulty, and some of these interesting questions are now before it for adjudication.

It is fortunate that we have a tribunal commanding public respect and public confidence, the mandates of which the people accept without regard to political affiliations or to pre-conceived opinions. This tribunal has nothing to do with questions of policy, or with the motives of Congress, or with the wishes of the President. To the constitutional power of the legislative and executive departments the courts address their attention, and this is the beginning and the end of their duty and jurisdiction. In yielding obedience to the decrees of the courts we do not obey the judges, but the constitution and the law, and obedience to law is the first duty of the citizen. Among the greatest, if not the very greatest, achievement of JOHN MARSHALL was his successful inculcation of this lesson,—a lesson that elevates the law, promotes good order and insures the stability of government. As was impressively said

by Sir James Bryce, it forms the mind and temper of the people, trains them to habits of legality, strengthens their conservative instincts and their sense of the value of stability and permanence in political arrangement. It makes them feel that to comprehend their supreme instrument of government is a personal duty incumbent on each of them, and familiarizes them with and attracts them by ties of pride and reverence to those fundamental truths on which the constitution is based.

After he had served twenty-eight years on the Supreme bench, JOHN MARSHALL, at the instance of his immediate neighbors, took his seat as a member of the convention called by Virginia to amend and reform the constitution which she adopted in 1776. No such body of men ever came together in any other State of the Union. As members of that convention sat William Branch Giles, the Governor of the commonwealth; Littleton W. Tazewell, a Senator in Congress; John Randolph, of Roanoke; Philip Pendleton Barbour, the statesman and jurist; Benj. Watkins Leigh, afterwards a United States Senator; James Madison and James Monroe, ex-Presidents of the United States; JOHN MARSHALL, chief justice of the Supreme Court, and many others whose fame, though less extended, were distinguished for ability and learning. A cotemporary writer, sketching the chief justice at this period, said of him that "his appearance was revolutionary and patriarchal. Tall, in a long surtout of blue, with a face of genius and an eye of fire, his mind possessed the rare faculty of condensation. He distilled an argument down to its essence." In this convention, speaking in defense of the county court system of Virginia, JOHN MARSHALL gave expression to his conception of the character and duties of the judiciary in this language: "Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the exercise of these duties he should observe the utmost fairness. Need I press the necessity for this? Does not every man feel that his own personal security and the security of his property depend on that fairness? The judicial department comes home in its effects to every man's fireside. It passes on his prosperity, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control

him but God and his conscience? * * * I have always thought, from my earliest youth until now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, corrupt and dependent judiciary." If JOHN MARSHALL had no other claim on the American people, the utterance of these sublime sentiments would entitle him to perpetual remembrance.

His public life commenced with the revolutionary war. He lived through the critical period of our country, from the close of that war to the organization of the government under the constitution. Devoted to the union of the States, he was an ardent friend and a supporter of the constitution. Without pretending to respect the voice of the people, emotionally or hysterically expressed, JOHN MARSHALL let no opportunity pass to announce that the people are the source of all power, and that their will, within the limitations they have permanently established, when regularly and deliberately declared, is the law of the land. His theory of our government was: "That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental, and as the authority from which they proceed is supreme and can seldom act, they are designated to be permanent. This original and supreme will organizes the government and assigns to different departments their respective powers. It may stop here or establish certain limits not to be transcended by those departments."

He did not reason after the manner of the philosophers, who deal alone with abstract principles. He did not express himself in the language of the poet. He did not attempt to show, nor did he believe, that the maxim *vox populi vox Dei* is or ever was to be accepted as literally correct, but he always recognized that in free governments, sovereignty, in the most comprehensive sense, resides with and inheres in the people. Organized government embraces that portion of the original and illimitable power of the people they may choose to impart to the agencies they institute. Original sovereignty is one thing, delegated sovereignty another, —and this distinction he never lost sight of. He realized to the

fullest extent that "power in the people is like light in the sun—native, original, inherent, and unlimited by anything human. In government it may be compared with the reflected light of the moon, for it is only borrowed, delegated, and limited by the intention of the people whose it is and to whom governors are to consider themselves as responsible, while the people are responsible only to God, themselves being the losers if they pursue a false scheme of politics."

Constitutions do not create individual rights or impart them to those by whom constitutions are ordained. The rights of persons are original—not delegated. Magna charta, bills of right, the petition of right, and our State and Federal constitutions, are intended to guarantee, preserve and protect those attributes of men that are inherent and inalienable. Government is a necessity with civilized man, but it emanates from the sovereignty of the people and remains at all times subject to such changes or modifications as that sovereignty may decree. The philosophy—I may say the framework—of our government was thus epitomized by the great chief justice: "When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceeded not from the people of America, but from the people of the several States, and remain after the adoption of the constitution what they were before, except so far as they may be abridged by that instrument." He was a "State's rights" man in that he respected and on all occasions upheld the rights and powers reserved by the States and the people, but he undeviatingly advocated "the preservation of the general government, in its whole constitutional vigor, as the sheet anchor of our peace at home and safety abroad."

I am admonished by the hour that I cannot follow further the story of his great performances. Full of years and full of honors he passed from life's labors to his eternal rest. His works live after him. They are the daily companion of every American lawyer and the *vade mecum* of every American court. "His setting sun loomed out in cloudless splendor as it sank below the horizon. The last light shot up with a soft and balmy transparency, as if the beams, while yet reflected back on this earth, were but ushering in the morn of his own immortality."

One further thought and I shall have finished the task assigned me. Great as were the intellectual powers of JOHN MARSHALL and pre-eminent as were the services he rendered as the first judicial officer of the republic, he could scarcely have attained the commanding position conceded him by his own and succeeding generations without the loyal, generous and earnest support of the profession which still delights to do him honor. The members of that profession have always taken an active part in the vicissitudes of society and always exercised a dominating influence in public affairs. They do not constitute a class, privileged or otherwise. They come to the bar from every walk of life and from every pursuit or avocation in which the people engage. They are always in touch with those from whom they spring. The advocates of order and regularity, they are the last to compromise with innovation. Revering precedent, they are naturally conservative. Believing in stable government, their conception of real freedom is subordination to the reasonable rules and regulations dictated by experience for the government of men, but they are also sticklers for the equal protection of the law and for its due and regular administration. With them the courts are the visible organs of legitimate authority, and the judges the personal representatives of the dignity and majesty of the law. Hence it was not unnatural, it was to be expected, that from the beginning the eyes of the American bar should be turned to the high court whose jurisdiction and power exceeded that of any other judicial tribunal in the world; and when its decisions proved equal to the important questions it was called on to adjudicate, and its opinions spoke the language of exhaustive research, profound learning and exalted ability, the bar of the country took up the championship of the court and the defense of its great leader against the attacks of political opponents, and against the hostile criticisms of those whose business it was to denounce without consideration and to condemn without reason. Identified with the court, as its officers and advisers, were such counsel as Webster, Tilghman, Rawle, Dexter, Wirt, Pinckney, Nicholas, Harper, Leigh, and a host of others whose fame reached every section of the country, and whose names gave character and standing to the American bar of the earlier days of the nineteenth century. Those exalted characters added luster to the court in which they practiced their profession and inspired the

public with confidence and respect for that august tribunal. As their successors we are here to re-assert the continued and unabated adherence of the bar to the courts of our country, State and national, and to keep alive the memory of that great jurist, the purity of whose life, public and private, and the grandeur of whose judicial achievements, portray, as they illustrate, all that is elevating and ennobling in the profession of which we are proud to be accounted members.

To the dignified, able and distinguished court in whose presence I stand and at whose bar I have had the privilege and the honor to speak, to the Bar Association of Illinois, whose guest I am, and to all who have honored me by their presence to-day, I return, in the fullness of my heart, the thanks I find myself unable fittingly and appropriately to express in words.

On behalf of the court Mr. Chief Justice Carroll C. Boggs responded, as follows:

It was a favorite expression of Mr. Carlyle that "the history of a nation is the biography of its great men." The soldier who has carried the flag of his country to victory in the field of war, the sailor who has triumphed in battle on the sea, and the orator who correctly interprets and gives eloquent expression to the cherished ideas and beliefs of the people, have always aroused public enthusiasm, received ovations while living, and the anniversaries of the great events of their lives have been commemorated by their grateful countrymen. The labors which ennoble the life and character of a great judge relate to and deal with the liberty, safety and security of life and person of the individual and the preservation of the rights of property of every person, natural or artificial; and in a court of review those labors, exacting and arduous, are performed in the seclusion of the conference room or the quiet of the chamber or library, and though in their nature wanting in that which so readily attracts the attention or wins the plaudits of the busy citizen, equally demand, if a judge has proven worthy, upright, truly great, just and impartial in his position, that his biography, with that of the soldier, the sailor and the orator, should be deemed a part of the history of his race and his country.

I do not, however, presume to attempt to add anything to what has been so eloquently and completely said of Chief Justice MAR-

SHALL in the address of Senator Lindsay. Chief Justice MARSHALL knew how to be a great and dignified judge and at the same time a plain and unpretentious American citizen. He possessed a powerful mind and an incorruptible character, and to these qualities all parties and all beliefs can join in rendering tribute.

The thoughts which are brought uppermost in the mind by association of ideas connected with the theme of the address to which we have listened relate to the long, weary road along which mankind has traveled to attain, protect and secure that degree of freedom and happiness enjoyed under the institutions of our government. Other people than ours may have lived or may now live under just laws, equitably and fairly executed; but the safety of a free man is that he lives in a government where the power and authority to govern rest in the people upon whom the laws are to operate, and where the law-maker is restricted by constitutional limitations to the enactment of only just and equitable laws, and where all who are or may be empowered to aid in the administration of those laws are also checked and guarded by the wise and wholesome limitation of a written constitution.

It is possible a wise and humane ruler, though possessed of despotic power, may grant his subjects wise and just laws. The liberty and security, however, of the citizen demand the governed shall be the judge of what is wise and just, and shall not be left unprotected against a possibly unwise and despotic ruler. A free people cannot, therefore, be said to be those who live where good and wholesome laws exist and are equitably administered, but those who live under a government so constitutionally guarded and limited that oppressive laws cannot be enacted or arbitrary power exercised by those in authority.

A written constitution guaranteeing freedom and justice to every person, and placing limitations upon the power of every department of the government and upon the haste and passion of the people themselves, and an independent judiciary empowered to support the organic law against every contravening enactment, every attempted violation of the limitation placed on official power, every outbreak of popular clamor, is the surest safeguard of the life, liberty and property of any people that the brain or conscience of man has ever devised. The necessity for preserving inviolate the organic law of the nation and of the respective States, each State being sovereign except in so far as its sovereign

power has been delegated to the national union of the States, can not be too strongly impressed on the mind of the citizen, the executive, the law-maker and the judiciary. Worthy to be treasured are these words, the utterances of the late Judge Cooley: "The habit of mind which consents to the doing of constitutional wrong even when it is supposed some temporary good may be accomplished, should be recognized as a foe to constitutional limitations and securities, and which, therefore, at any cost, must be corrected."

How naturally, under the influence of this occasion, the mind recurs to the marvelous growth of the principles of human freedom under the conserving force of our system of written constitutions, and with what conscious and laudable pride do we contemplate the contributions of the American people to the principles on which are bottomed the rights and liberties of the race. It was our forefathers who overturned the dogma which prevailed in all monarchies that each human being owed perpetual allegiance to the reigning family of the land of his or her birth, and introduced into the law of nations, and caused to be firmly intrenched and established there, the doctrine that every person possessed the indefeasible and inalienable right to absolve himself or herself, at will, from all obligation of loyalty to king or crown and transfer his fealty to the free institutions of our republic. In this land of ours, for the first time, a general government was founded on a written constitution granting to each department of the government such power, of any character or degree, as it is permitted to exercise, and here it is we find in the different States the people as the repository of all power to govern, causing to be set forth in written State constitutions the restrictions and limitations on both the legislative and executive branches of the local government that they have in their own wisdom deemed essential to protect the public against encroachments on the part of those in authority. We were the first among the powers of the earth to abandon the kingly dogma that governments were established among men through gracious power divinely vested in some vaunted "defender of the faith," and to declare and effect a complete and permanent separation of church and State and to establish religious freedom as an article of organic law.

The honest debtor has been freed from the possibility of imprisonment by the creditor, the wife emancipated from oppressive domination of the husband. An act not unlawful when committed

cannot be declared to be a crime and made punishable by future enactment. The obligations of lawful contracts are preserved from all that would impair them. Private property is protected against seizure for public use except upon just compensation. The undue severity of the old criminal laws, prescribing punishments often capricious and always cruel, has given way to more humane provisions, and we have entered,—experimentally, at least,—on the policy of pronouncing indeterminate sentences and granting paroles to many of those who have been convicted of violating the provisions of our criminal code. The youthful offender finds the place of his confinement a home and a school, and his punishment only such as tends to correct and reform him.

Lands have been made freely alienable and the ownership of the soil and a home encouraged. Beneficent enactments protect the homestead of the householder and his family, the household goods, personal apparel and the implements of his occupation from forced sale. Schools are maintained free and convenient to the pupils, and the nation contains a smaller proportion of illiterates and a larger proportion of those who read and write than any other government. The insane, the deaf and dumb, the blind and those of feeble mind have substantially been adopted as the wards of the State, and the public treasury is charged with the burden of ameliorating, if it may, their afflictions. Freedom of the press and of speech has been assured, save only as to restrictions necessary to the right and reputation of the citizens, and it may safely be predicted the problem arising out of the control, ownership and operation of all public utilities will be adjusted with due regard to the rights of the public in every business impressed with the public use, and in harmony with the constitutional principle that every person, natural or artificial, is entitled, in person and property, to the equal protection of the law and to the benefit of every organic provision for the protection of the rights of property.

All this, and much more that time will not permit to be adverted to, has been accomplished to add to the liberty and happiness of man. More remains to be done, for the reason the development of civilization must continue,—perhaps is infinite; but our fundamental laws provide for their own enlargement by amendments to meet the varying or increasing advancement of the race. A disposition to make frequent changes in our constitutions is unfortunately ever present. The visionary reformer, who is swift to

substitute utopian dreams for the actual experience of ages; the restless agitator, who exalts unrestricted license above liberty under the law; those who, under the stress of adverse circumstances, weakly and rashly chafe at every obstacle to temporary relief; those who cherish schemes which contemplate the exaction of burdensome and unconstitutional rates of taxation; he who is ready to tear down for the mere pleasure he finds in rebuilding; he who finds pleasure in tearing down without any thought of restoring, and those who refuse to recognize that real reforms cannot be crystallized into law until their merits have secured lodgment in the public mind, are all ready to lead an assault on the existing organic law of the State. But the bulwark of safety is the practical, conservative sound sense, intelligence and patriotism of the masses of our people. Trained to govern themselves, proud of their institutions, the common, plain people may be safely trusted to consider prudently and determine with caution and wisdom when and whether the further development of our citizenship shall require that amendment be made to the organic law in the Union or in the States, and to effect any needed changes without violence to social order, the destruction or impairment of personal or property rights, or in any manner disturbing the established institutions that constitute the foundation on which now so securely rest the best hopes, desires and ambitions of mankind.

Hon. George T. Page, of Peoria, addressed the court, as follows:

May it please the court—At the beginning of the nineteenth century, when our nation, with its untried constitution, was confronted with many perplexing and difficult questions, the people of this country were more fortunate than they knew in seeing JOHN MARSHALL become chief justice of the Supreme Court of the United States. And, too, at the beginning of the twentieth century, when new and important questions are again confronting us, when new policies are being tried, the nation is again fortunate in seeing the bench and bar of every State engaged in the study of the life and works of the great chief justice and in the celebration of the one-hundredth anniversary of his appointment.

About two years ago the Hon. Isaac N. Phillips, now the official reporter of this court, in an address upon JOHN MARSHALL, said:

"Whoever shall popularize the fame of JOHN MARSHALL will do an inestimable service to the history of this country." It seems to me that this celebration will do much to bring into popular favor the name and works of JOHN MARSHALL, and for the purpose of further accomplishing this object and of perpetuating the able and interesting address, I suggest that these proceedings be spread upon the records of this court and published in the official Reports of this court.

In accordance with the motion of Mr. Page it was ordered that the proceedings of the day be spread upon the records of the court and published in its official Reports.

IN MEMORIAM.

JESSE J. PHILLIPS—WILLIAM J. ALLEN.

PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS, AT SPRINGFIELD, ON WEDNESDAY, JUNE 5, 1901, BEING OF THE JUNE TERM OF THAT YEAR.

The Hon. JESSE J. PHILLIPS, one of the Justices of the Supreme Court, died at Hillsboro, Illinois, on February 16, 1901. The Hon. WILLIAM J. ALLEN, Judge of the District Court of the United States for the Southern District of Illinois, died at Hot Springs, Ark., on January 26, 1901. At the June term, 1901, of the Supreme Court, on the 5th day of June the following proceedings were had:

Judge S. P. Shope, addressing the court, said:

May it please the court—By direction of the Chicago Bar Association I present to this court the following brief memorial upon the life and services of the late Justice JESSE J. PHILLIPS, as prepared by the committee of that association appointed for that purpose, and I move that the same be spread upon the records of this court:

"On Saturday, the 16th day of February, 1901, JESSE J. PHILLIPS, one of the justices of this court, died at his home in Hillsboro, Illinois, and two days later, amid a great concourse of sorrowing neighbors and friends, was committed to his last earthly resting place. At the time of his death he was sixty-four years of age. He was admitted to practice as an attorney of this court on the 11th day of January, 1861, and at once entered into the active practice of his profession. Upon the breaking out of the late civil war he enlisted, and upon the organization of the Ninth regiment of Illinois volunteers was elected its major. Upon the expiration of the term of enlistment the Ninth regiment was re-organized, to

serve for three years or during the war. He was again elected major, and soon after promoted to the lieutenant-colonelcy of the regiment, and subsequently breveted for gallant and meritorious conduct. His promotion to the lieutenant-colonelcy bears date December 2, 1861. He remained in active service in the field three years and five months, retiring September 1, 1864.

"A narration of the military record of this gallant Illinois soldier would involve a practical recital of the history of the great battles within the border States. To re-count those in which he was engaged would render necessary a repetition of the incidents of sixty-eight battles and minor engagements, in all of which, with a single exception, he was with and frequently in command of his regiment. This exception is the second battle of Corinth. His absence from that battle was due to a wound received at Shiloh. It is not the purpose of this paper to do more than express, in passing, the profound admiration of the bar of Chicago for the heroic deeds and sacrifices of this, one of the foremost of the Union soldiers, who received encomiums in the field and from his superiors as one of the bravest and most tactful commanders. He was a fearless, skillful and masterly leader, and the history of the civil war has rendered his name imperishable.

"Upon his retirement from the army he returned to his home in Illinois and resumed the practice of his chosen profession, meeting with marked success. As a lawyer he prepared his cases with painstaking care and ability. He extended, and always received, the utmost courtesy from the courts and opposing counsel. His word, once given, was never forfeited or retracted. His professional career was marked everywhere by the highest sense of professional ethics and honor. It is said of him that he never sought for a client that which he did not himself sincerely believe to be the client's just due; that his first aim was to learn with accuracy the facts of his case, and then present them to the court and to apply thereto the law as he understood it. He early won the confidence of the bench and the bar and the people, not only as an upright and just man, but as an able, honest and fearless lawyer and advocate.

"When called upon to preside as judge of the circuit court of this circuit he served with distinguished ability. He gave to the hearing and decision of the cases before him always a patient and thorough consideration. His quick perception enabled him to discover the shams too often resorted to, and his mature and ripened

judgment enabled him to reach just conclusions. His popularity with the bar and the people of his circuit was perhaps unequalled, and certainly never surpassed, by one holding that exalted position.

"He was appointed by this court to the Appellate bench of the Fourth District, and served with marked ability until his elevation to this bench. Upon the demise of the late Judge John Scholfield, Judge PHILLIPS logically, and practically by unanimous consent, became his successor. He entered into the discharge of the duties of justice of the Supreme Court of Illinois at its June term, 1893. He came to this bench well equipped for the discharge of his duties. His discipline as a lawyer, his experiences upon the circuit and Appellate bench, and his broad training in the affairs of life, well fitted him for the work. However, it may, perhaps, be said that no one came to this bench under more trying circumstances. Notwithstanding his many years of experience as judge of the circuit and Appellate courts, he knew, as a successor of Judge Scholfield, his opinions would be criticised and compared with those of that distinguished jurist. To take up the work and follow in the footsteps of one who was considered pre-eminently a great jurist,—to take up the great work that his great predecessor had laid down,—while stimulating to his ambition was a task requiring bravery and self-reliance.

"He entered upon this work with that energy and honesty of purpose which had characterized him in every phase of life and in the discharge of every public and private duty. He was always courteous, tolerant of the views and opinions of his brethren of the bench and of the bar, and yielded readily to authority, or whenever convinced, by argument, of the rightfulness of any position. The bar of the State recalls with pleasure his attentive listening to the arguments of counsel and his ready comprehension of the points urged upon the consideration of the court. The conception of the bar was, and is, that he regarded his duty as a member of this court and of the inferior courts over which he presided, to be, to investigate the law and the facts, and to apply the law, as he understood it, to the facts of the particular case under consideration. No one knowing him ever doubted that he had the courage of his convictions,—that he was never swerved by matters of policy, but was governed solely by his conception of what was justice and the law, as he understood it, in the particular case. He was an earnest, industrious and painstaking judge, a generous and incor-

ruptible man and a brave and conscientious lawyer. As a member of the Appellate Court, and again of this court, the clearness of his statements and the irresistible logic of his opinions have elicited, and will elicit, the admiration of the bar and bench of the country.

"The members of the Chicago Bar Association recognize that in the death of Justice JESSE J. PHILLIPS the State has lost one of its most faithful and useful servants, the bench one of its brightest members, they a true and valued friend. Everywhere, whether amidst the strife of battle, or as a lawyer, or discharging judicial functions, or in his intercourse with his fellow-men, he met the just expectation of the people. His courtesy and uniformly loving kindness endeared him to the people, and his learning, ability and integrity commanded the admiration of the bar and of the bench, and his work as a jurist will be a monument to his memory more lasting than enduring bronze or marble."

Judge Shope, continuing, said:

May it please your honors—It has been truly said that there is nothing in the duties of a judge to excite the enthusiastic admiration of the populace; that a judge, toiling among books and records,—a martyr to his sense of duty,—is not a spectacle to elicit the applause of the multitude. Such a life is too barren of tragic incidents and too unromantic to be embalmed in story or in song, and yet to those able to appreciate the beneficence of such a life it is most grand and heroic. In our complex system of laws, embodying principles derived from the civil, common, ecclesiastic and statute laws, and forming under the hand of the wise judge a harmonious whole, the people are unable to perceive the force that guides and secures protection, peace and happiness to mankind,—far more valuable in their results than a life, however brilliant, which is devoted to the perpetuation of individual fame, whether it be amidst wars or in the executive or administrative guidance of the State.

Legislatures, composed mainly of those who are unfitted by study and experience to ascend those heights where they may view the growth of the law as it has kept pace with the advancing civilization of the race, can only be expected to legislate in view of the new conditions or emergencies that may arise. Such legislation is valuable only to the great structure of the law in so far as it

tends to crystallize into law the better and more advanced thought of the people. Laws thus passed are necessarily incongruous, and form a system of patch-work incapable of complete administration without construction and interpretation. So it is that material thus brought into existence must be "labored into shape," that the beauty and solidity of the structure of the law in its entirety may not be destroyed. This labor falls to the courts of last resort, and he who achieves distinction because of his skill, ability and devotion to this great work has a right to claim the gratitude of his countrymen.

To this class of benefactors of his race the distinguished judge whose life we commemorate to-day justly belongs. That he was a many-sided man is unquestionably true; and it is equally true that in every walk of life wherein he trod he impressed upon the generation that he was a leader of men. As a lawyer he early won distinction as a fearless and able advocate, a studious and painstaking jurist; and it is this phase of his life that we are more particularly called to consider to-day. In the great civil war his achievements were marvelous, and won the encomiums, not only of the people, but of those best qualified to judge of his merits. His wonderful endurance and personal courage, his unsurpassed gallantry as a soldier, his ability as a commander and his ready acquisition of the arts of war, together with his brilliant achievements, have gone into the history of his country, and he will be remembered as a distinguished military chieftain while the history of that war is read.

It is, however, as a lawyer, judge and man that I would speak of him. I doubt if any man ever came to this bench with a stronger determination to perform every duty, to fulfill every obligation of the station, more resolutely than did Judge PHILLIPS. His long experience as a lawyer, both in the practice and in the circuit and Appellate Courts, gave him strength and confidence in his ability to perform the duties of this high office. How he performed these duties his work upon this bench and the volumes of its Reports more eloquently tell than any words of encomium that I might utter in this presence.

It will undoubtedly always be a pleasure to the members of this court who were his associates upon the bench, to recall his affability and courteousness toward his brethren, in the conference room and elsewhere. However taxing and arduous the duty, however

great the mental or physical strain, he rarely, if ever, lost that courteous bearing toward his fellows, and cordial manners, which marked him in private life. Yet he will be remembered as one who always had the courage of his convictions; while yielding readily to authority if he believed the authority to be applicable to the particular case under consideration and promotive of justice, yet always standing up unflinchingly for what he believed to be right. I have sometimes thought he had less reverence for precedents than some of the judges that I know, but I also thought that this want of reverence grew out of the strong purpose of Judge PHILLIPS to establish the right and to do justice in the particular case he had under consideration.

He truly had the elements of a great judge. His ability to master the facts of a case was perhaps not excelled, while his perception of the principles governing and controlling was in a marked degree clear and distinct. He analyzed with great care and patience, and the cogency and force of his reasoning usually carried conviction. Although at times suffering from ill-health and from the wounds he had received in defense of the country, he yet performed each duty, and his opinions, even at such times, were clear, strong and concise, showing that he was capable at all times of close and deep investigation and clear and logical reasoning. He was best known to the people and State, undoubtedly, through his military and political record, but he was far better known to the bar and bench of the State and of the country by his long, faithful and successful career as a judge.

Judge PHILLIPS was pre-eminently a man of the people. His love for the common people was one of the controlling elements of his character and found expression upon all fitting occasions. This, with an intense love of justice and his generosity, formed strong, and sometimes controlling, elements of his character; and especially so in all matters of mere individual action. It is not, however, true, that in any sense it controlled him as a lawyer or a judge. He might be misled by those whom he loved, but never consciously; nor could he be knowingly swerved from what he believed to be the right by any considerations, however much they appealed to his heart.

Not only was he pre-eminently learned in the law and possessed of a judicial capacity of the highest order, but he was equipped with broad learning in all those departments of art, science and

literature which make up the sum of human knowledge. He was a man of broad reading and culture, and attained to a very considerable distinction as a literary critic. His reading, aside from the law, not only aided in ripening his judgment, but gave him a fund of knowledge applicable to the affairs of life and a facility of expression far beyond the ordinary lawyer of the day. Some of his opinions furnish not only evidence of his profound legal attainments, his power of statement and logical reasoning, but may well be classed as literary products of a very high order.

As a man he was just and generous. He measured the faults of others with charity, and condemned, if condemn he must, with regret. His own life was an open book, and it has been truly said of him that "neither in peace nor in war did he consciously do any man wrong." It may possibly be said of him that he had too little regard for those rules of society by the observance of which even whited sepulchers appear well before the public gaze. He hated all shams and pretenses with a religious hatred, was honest in his own purpose, just in his estimate of men and affairs, and had no patience with either hypocrisy or pretense.

He was a loving and lovable man, a true friend, without guile, deceit or hypocrisy. He was a brave and patriotic soldier, equal to every emergency in the dread hour. He was a careful, painstaking and conscientious lawyer, and had, as such, a high appreciation of the dignity of the bench as the representative of the sovereignty of the people in their collective capacity, and of the importance of the maintenance of its purity and independence. When he came to judicial position he carried with him in the discharge of the functions an appreciative sense of the dignity of his office, and of the necessity, if civil government was to endure, of the great work to be accomplished by the judiciary.

As a judge he sought, with all his great ability, to magnify his office. He labored to establish those principles which he believed to be necessary to the preservation and protection, as well as the advancement and upbuilding, of our rising civilization. The principles established by this court while he was a member, and in respect of which he wrote and voiced the opinion of the court, will continue to be respected and cited in the advancing years as landmarks in the progress of the civilization of the American people.

But neither the ripeness of his judicial learning nor the generous impulses of his heart could save him from the common fate of

mortality. His was a strong, unique and picturesque manhood. He was a typical American soldier; a brave, daring and brilliant, but tactful, commander. Upon his return to civil life his State gave him its highest honors, and conferred upon him offices of the highest dignity within its gift. He so filled every office and discharged every duty in public and private life as to receive and retain the respect, confidence and veneration of the bar and love of the people. And so on the 16th day of February, 1901, he died, with honors, unpaled by the sicklied hues of death, thick upon him.

Had he faults? If he had, none will recall them now and I will not remember them, for

"Death's cold, white hand is like the snow
Laid softly on the furrowed hill.
It hides the broken seams below
And leaves the summit brighter still."

I may be permitted to add, that there is a prevalent belief, especially in the minds of those who have met with irretrievable loss and overwhelming sorrow, that emanations from the Almighty beneficence cannot be destroyed. In the physical world about us we see decay and change. To-day we behold the rude clod, and to-morrow we grasp the beautiful lily of the valley. It returns again to the noisome earth, and again is re-produced as the fragrant rose. The form is changed but no particle of matter is lost. And so it is believed in the moral and spiritual world that the good which cometh from the Father alone is indestructible. The seasons will come and go; the winters will cover with their white mantle the rude mound where he lies, only to fructify the soil, that flowers and perpetual verdure may spring upon it.

It may be that the good and evil in men's lives are permitted to grow together until the harvest, and that the good that cometh only from the Father will be gathered by him into his garner and the evil in men's lives destroyed as by fire. If one has clothed the naked, fed the hungry, uplifted the fallen, listened to the cry of distress and relieved the oppressed and the erring, the plaudit of "Well done, good and faithful servant," is promised; and if this be so, may we not believe that all that marred the beauty and symmetry of our brother's life,—if aught there was,—lies hid in the cerements that wrap his mouldering clay, and that he has pushed aside the portiere that divides mortal life from immortality, and stepped forth upon the vantage ground where he may view the limitless eternity of the past and the no less boundless eternity of

God's future? And Oh! if it be that he is there clothed upon with every noble, good and generous deed of his life,—every kindly word and impulse of his soul,—how like a prince was he arrayed as he went forth to receive the welcome of his King and Lord!

Mr. Justice Boggs, on behalf of the court, responded as follows:

The court has listened with great pleasure to the kind words the bar of the State, through its honored and eloquent representative, has been pleased to say of our late brother on this bench. Judge JESSE J. PHILLIPS was indeed blessed with rare gifts of both head and heart. It would be but empty, unmeaning and wholly ceremonial laudation to say he was great in all things and at all times, and exempt from every weakness of human kind. The history of the generations of men since the world began bears the record of but one perfect man,—if it be lawful to call Him of Nazareth a man. The test of character and the grace of forgiveness do not rest altogether on the merit of good deeds performed, but in a large measure upon the temptations to error and folly which have been resisted. The wisest and best of earth are not exempt from all the faults and follies of the race. To quarrel with the imperfections of human nature is to criticise the wisdom and justice of the Maker, who is all-seeing where men are blind.

Judge PHILLIPS was a true and loyal friend, an honest man, kind of heart, a lover of the plain, common people, from whose midst he sprang. He cared not for rank or pride of birth. He knew not the love of wealth. His noble heart, full of generous emotions, remained untouched by the blight of the greed of gain and free from the petrification of selfishness. Those who would criticise must admit his faults or shortcomings were without any admixture of harmful intent.

It was his ruling desire that his duty as a judge should be well performed, and that his work, and the work of the court, should merit the approval of the bar and of the people. He realized the judiciary in the State and in the nation constituted, in part, the basis of government, and he recognized to the fullest extent that if public confidence in the courts of last resort should be shaken, the foundations on which the institutions of freedom rest would become insecure. But he well knew it was the matured or second thought of the public that should be considered,—not the excited

emotions of the hour,—and he wrought for what seemed to him to be right, in the faith that justification would follow calm reflection. He realized that in a government of the people and by the people it is the part of wisdom in the public servant to await with confidence the perfect work of deliberation and reason in the public mind. The haste of passion and rashness of the moment he knew would subside and that the conscience and good judgment of the masses would in the end prevail, and he wrought in that view.

Judge PHILLIPS was not moved by public clamor. On the bench he was as brave as on the field of battle, and the cruel wounds which scarred his body bore mute but indisputable evidence that he possessed that courage which unflinchingly faces death and fears not. As a magistrate he had the moral courage to lay the law as by the line and pronounce judgment as by the plummet, treating the parties, their condition in life, the political aspect of the controversy, if any, as but the merest inconsequentialities. He was a lover of justice and mercy, and sought to exemplify those attributes of his nature in every cause in which he sat as judge. He was watchful of every safeguard of liberty and of the rights of man,—loved our country, our State and all our institutions of freedom. In the conference room he was the soul of honor and courtesy. He advanced his views with almost courtly grace; listened with great respect to the views of his brethren of the bench and gave consideration thereto; was tolerant of the opinions of others; firm in his fully matured convictions, but obedient to the will of the court when authoritatively expressed. He was jealous of the good name of the court and of his own official reputation, and during all the years of his life no spot or blemish came upon the ermine of his office.

Though not favored with the habit or disposition of continuous application, Judge PHILLIPS accomplished by the exercise of tremendous labor exerted at irregular intervals, continued almost unceasingly when once begun, that which others reached by the more wholesome and healthy process of steady and regular effort. When so engaged he banished many of the hours of sleep, summoned every energy of brain and nerve, and held them to the task without regard to the demands of nature for rest or opportunity for recuperation. Ills, physical in character, growing out of such exactions upon his store of bodily and nervous vigor, no doubt contributed to the afflictions which culminated in his death. His chair

on this bench was unoccupied for more than a year—so long did his splendid physique and indomitable courage resist the maladies which finally overcame him.

That which men call death and believe to be life hath overtaken him, as it must overtake us, every one. It was the faith of the good poet, Whittier, that the voyage of death leads to the blessed isles of the hereafter, and of it he sang:

"I know not where his islands lift
Their fronded palms in air.
I only know I cannot drift
Beyond his love and care."

The members of this court attended his funeral obsequies in a body and gathered about the casket in which lay his lifeless form in order to testify to their esteem and respect for the man and for his memory.

At a meeting of the bar of Sangamon county, held in the city of Springfield, a memorial was adopted upon the death of Hon. WILLIAM JOSHUA ALLEN, late a judge of the United States Court for the Southern District of Illinois. At said meeting a committee was appointed, consisting of George W. Wall, of Chicago, William W. Barr, of Carbondale, and William L. Gross, of Springfield, with instructions to present the said memorial of the Sangamon county bar to the Supreme Court of Illinois. The memorial was adopted, as follows:

WILLIAM JOSHUA ALLEN was admitted to the bar at Mount Vernon on the 28th day of March, 1848. He at once entered upon the practice of law at Metropolis, Massac county. He was enrolling and engrossing clerk of the House of Representatives in the legislative sessions of 1849 and 1851. In November, 1854, he was elected a member of the House of Representatives. He was appointed United States district attorney for the Southern District of Illinois in 1855, and resigned that position in March, 1859. Shortly after, he was elected circuit judge of the Twenty-sixth circuit, to fill the vacancy occasioned by the death of his father, Willis Allen, and served the remainder of the term, when he declined a re-election. In November, 1861, he was elected a member of the constitutional convention which met in January, 1862, where he was a member of

the judiciary committee and chairman of the committee on bill of rights. In the spring of 1862 he was elected a member of Congress, and was re-elected in the fall of that year. He was elected a member of the constitutional convention which met in December, 1869, and which framed the present constitution of Illinois. In that convention, also, he was a member of the judiciary committee and chairman of the committee on bill of rights. In April, 1887, he was appointed judge of the District Court of the United States for the Southern District of Illinois, in which capacity he served till his death, January 28, 1901.

From the time of his admission to the bar he was always prominent in politics,—except, of course, while on the bench. He was extremely popular and influential with his party, and was thoroughly respected by political opponents for his ability and candor. He enjoyed a most unusual share of confidence and esteem from the people at large as well as with party leaders. His personal acquaintance with all classes was phenomenal. While not on the bench he was also actively engaged in his profession. He early attained a position at the very front, and easily maintained it. He was constantly employed in the most important litigation arising in the southern part of the State, and was justly regarded for many years as the leading *nisi prius* practitioner of that section.

As a judge he was learned, dignified, impartial, and always anxious to do exact justice. In all the relations of life he was a model of courtesy and kindness. Having the strongest and deepest convictions on all subjects of general interest, he was tolerant of the opinions of others. His personal qualities endeared him to all who knew him. His mental powers commanded universal admiration, and his memory will be cherished in a degree scarcely ever accorded to men whose lives have been mainly passed in the struggles of the bar and of public affairs.

In presenting the above memorial, Hon. George W. Wall, speaking in behalf of the committee and of the Sangamon County Bar, made the following remarks:

May it please the court—In the death of Judge ALLEN Illinois has lost one of her distinguished sons. The greatness of a State is measured by its men. Its cities, its railways, schools, factories, its farms,—these are all the work of men. They are the visible signs of progress. But behind them, and sustaining the whole

fabric, must be a system of government and law, without which material growth is impossible. When a man is engaged in the moulding and administration of political and legal affairs, his work relates to the most vital and important interests of society; and when for more than fifty years he has been so engaged, has done his work well, has won the confidence and esteem of his fellow-men and has gone to the grave in honor, it is fit that some recognition should be made of his life and services.

It was said of old that no man could be counted happy while he lived, because to the most gifted and successful some accident, some error, some untoward circumstance, might bring mortification and distress. A long, bright day may end in storm and cloud. Judge ALLEN was singularly fortunate in this respect. From the beginning to the end his day was clear. If a few floating clouds ever flecked the sky, they did not obscure the sun; and the beauty of the evening befitted the glowing morn and the glorious noon-tide.

Few men have been more in the glare of publicity and few have borne it better. Few men have had clearer views of the fundamental principles which support a popular form of government, and few have had more faith in the inherent strength of popular institutions. He believed that a free and intelligent people can govern themselves, and that such government is the highest product of civilization. As chairman of the committee on the bill of rights in the convention which framed the present constitution he urged and secured the adoption of article 2 of that instrument. Section 3 of that article contains provisions upon which he was especially insistent. While he was always orthodox on religious subjects,—living and dying in the faith of his church,—yet he demanded that those whose opinions might be deemed heterodox should be fully protected by the organic law. The constitution of 1818 declared: "No religious test shall be required as a qualification for any office or public trust under this State." The same provision was placed in the constitution of 1848. It occurred to Judge ALLEN that some honored citizen, cultured and eloquent, who had served his country on the field and in civil station, might be eligible to the highest office in the State and yet might be incompetent as a witness because of his religious belief, and he re-wrote the provision as it appears in the present constitution: "No person shall be denied any civil or political right, privilege or capacity on account of his religious opinions." What a step forward

since the day when Savonarola was hanged in Florence by the Pope! And since that other day, a generation or so later, when Servetus was burned at the stake in Geneva by John Calvin!

And so Judge ALLEN conceded to all men the utmost liberty of opinion upon political subjects while steadfastly adhering to his own views. He knew that free thought and free speech are indispensable in a free government, and that the clash and controversy of free discussion will ever point the republic to paths of safety. Yet no man more thoroughly hated anarchy. He constantly appealed to the constitution and the laws for the guidance of the citizen and the State, and on all proper occasions he ardently defended these as the bulwarks of public and private rights. Such a man is patriotic in the broadest and best sense of the term, comprehending fully the sources and conditions and appreciating the blessings of his government and anxious to preserve it for all posterity.

The exercise of political influence is not confined to the officeholder or to the party in power. The system we have was purposely devised with a view to the participation of the whole people in public matters, and while a small majority may from time to time determine what policies shall prevail, yet the active course of the minority will always modify the attitude of the majority, and in the end reasonably fair and conservative results are obtained.

Concurrent with his activity in politics was Judge ALLEN's professional career. There, also, he was pre-eminent. His temperament and gifts fitted him for the contests of the bar. His mind, discriminating, subtle and capable of long and arduous effort, surely grasped and analyzed the facts, and he had rare power in presenting the controlling features of his case in the most effective way. This is absolutely essential to success, just as it is necessary that a painting should be properly adjusted to the light and then viewed from the right standpoint in order to bring out its harmonious effects and to reveal all its beauty. He was a *nisi prius* lawyer of the best type; deferential, courteous, self-controlled, vigilant, resourceful, fully equipped at all points, convincing, magnetic and true to his cause. His judicial career, both earlier and later, was most satisfactory. To great legal acquirements and experience he joined patience, careful consideration, absolute impartiality and sound judgment. His private character was above reproach, and his personal qualities gave him great popularity

with all classes. He liked the people, and they liked, admired and respected him.

His name appears on the roll of attorneys in the Fifth Gilman. This court was then composed of three judges—Caton, Treat and Trumbull. They were the first to sit in that capacity under the constitution of 1848. Judge Caton remained on this bench until 1864, when he resigned. Judge Trumbull resigned in 1853 and in 1855 entered the United States Senate. He was succeeded on the bench by Judge Scates, who resigned in 1857. Judge Breese succeeded him, and continued there until his death, in 1878. Judge Treat resigned in 1855 to accept the position of United States district judge, which he held until his death, in 1887. Judge ALLEN was his successor on the Federal bench. The Fifth Gilman was the tenth volume of the Reports of this court. Since then the number has grown to 189, besides the 93 volumes of the Appellate Court. And the growth of the State has been as great in all other respects. The advance in the last half century has been wonderful, indeed. No pen can describe it, and those who have been a part of it can hardly realize it. Judge ALLEN did his full share in all this.

History delights most in the physical contests of the world. Wars of ambition and conquest, commanders of contending hosts, attract most notice. Military glory and glitter captivate the multitude and obscure all else. For more than forty centuries the earth has been shaken by the tread of armies and reddened by the blood of battles. Alexander, Hannibal, Charlemagne, Marlborough and Napoleon fill the historic page, and overshadow students, philosophers, statesmen and jurists. But, after all, the real, the best, the greatest work is that of the thinker. Of all intellectual fields that of the law is widest, and its ministers are most potent in fixing and directing the destinies of man. After the nation has won its victory at arms, a treaty, according to forms of law, must settle the terms; and, finally, to the judicial department is committed the great task of determining the status of the new possessions, the rights of its people and the limitations to be observed by the government. Such is the triumphant reign of law. The hand of Cæsar must yield to the brain of Plato. Peace hath her victories, no less renowned than war,—immeasurably greater, indeed. The organic law holds in firm check the strong, protects the weak, guards private property, secures freedom of speech and opinion, and so insures "government of the people, by the people and for

the people." This is the work of the student of public affairs,—the lawyer in his highest sphere. A growth of long periods it may be, contrived to meet the needs of the individual and to provide an effective system of government where all are equal before the law.

To the legal profession the world is indebted for the evolution and perfection of civil administration, based upon and limited and controlled by organic law. No member of that profession has shown more devotion to the constitution or felt more pride and satisfaction in its support and enforcement than Judge ALLEN. As a legislator, lawyer, jurist, political thinker and actor, and as a man, he made an indelible impress upon the history of Illinois, and the record of his life is an enduring tribute to the excellence of the institutions he loved so well.

At the conclusion of the above remarks by Hon. George W. Wall, Mr. Chief Justice Wilkin, in behalf of the court, said:

The high esteem in which our deceased brother, Justice PHILLIPS, was always held by the members of the court could not be better expressed than in the memorial which has been presented, together with the timely and eloquent remarks which have been made by Judge Shope in presenting the memorial. The same may be said of the memorial presented by Judge Wall upon the life, character, services and death of Judge ALLEN. I shall not attempt to add anything to what has already been so well and so truthfully expressed. It only remains that I order the memorials to be spread upon the records of the court; and as a further mark of respect to the memory of the deceased the court will now stand adjourned until to-morrow morning at nine o'clock.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

JOHN R. FOULKS *et al.*

Opinion filed June 19, 1901.

191	57
202	*555
191	57
209	7 21

1. **CARRIERS**—*railroad company is liable to shipper for negligence of its employees.* A railroad company which owns and operates its own track between two given points is liable to persons shipping freight over its line for its own acts of negligence or the negligence of its employees.

2. **SAME**—*when contract between carriers does not create the relation of agency.* A contract between connecting railroad companies, which provides that they shall operate their respective lines for their mutual advantage "as allied lines of transportation," all damages for injury to freight to be adjusted between them according to the custom of railroad companies, etc., does not create the relation of agency between them, but each company, under such contract, is liable for the torts and negligence of its own employees, whether liable for the torts and negligence of the other or not.

3. **SAME**—*carrier receiving freight to be carried beyond its line is the agent of owner.* Where freight is to be shipped over several lines of railroad, the first and each succeeding carrier becomes the agent of the owner of the goods to make delivery to the next carrier, and it must do so to avoid liability.

4. **SAME**—*carrier acting as agent for another is liable to third parties for its own misfeasance.* If one railroad company is acting as agent for another in the handling of freight shipments, the company so acting as agent is liable to third parties for the misfeasance of its own employees.

5. **SAME**—*when mistake in billing is an act of misfeasance.* Billing potatoes in car-load lots via a specified line of steamers from a certain intermediate point is an act of positive misfeasance where the forwarding carrier had in its possession rate-sheets routing such shipments all-rail and stating that the steamer line would not accept bulk freight, and such forwarding carrier is liable to the shipper for the result of the delay occasioned by the mistake, even though it was acting as agent for one of the companies forming the transportation line over which the shipment was routed.

6. **ACTIONS AND DEFENSES**—*court may enter judgment against part of defendants in action of tort.* In an action for tort it is not improper for the court to enter judgment against one defendant and grant a new trial and permit the suit to be dismissed as to the others, even though the verdict was against all of the defendants.

7. **LAW AND FACT**—*whether written contract creates relation of agency is a question of law.* Whether a written contract creates the relation of principal and agent between the parties is a question of law for the court.

8. **PRACTICE**—*proper method of objecting to testimony in form of deposition.* If the objection to an answer given in a deposition taken upon notice is one which may be obviated by better evidence, the proper method of urging such objection is by motion, before trial, to suppress the deposition.

Illinois Central Railroad Co. v. Foulks, 92 Ill. App. 391, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

The following statement of facts is made by the Appellate Court in their decision of this case:

"This is an action on the case, brought by appellees against appellant, together with the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Chesapeake and Ohio Railway Company, the Richmond and Danville Railroad Company, and the Pennsylvania Railroad Company. The jury, before whom the case was

tried, brought in a verdict of guilty against the Chesapeake and Ohio Railway Company, the Pennsylvania Railroad Company and the appellant, and assessed the plaintiffs' damages at \$1913.31. At a former trial a jury had found the Cleveland, Cincinnati, Chicago and St. Louis Railway Company not guilty, and service of process was never had against the Richmond and Danville Railroad Company. The verdict of the jury in the present case, therefore, found all the remaining defendants guilty. A motion for a new trial was granted as to the others, and the suit dismissed as to them, but the motion was overruled as to appellant. The circuit court denied a motion in arrest, and entered judgment for the full amount of the verdict against appellant alone.

"The material facts are, that in April, 1890, appellees, who were doing business at Malvern, Iowa, shipped a quantity of potatoes to Philadelphia. It appears that the route chosen was not the most direct. But the agent of the Omaha and St. Louis Railway Company at Malvern induced appellees to ship over the latter road, promising, it is said, to get the potatoes to Philadelphia within five days. They were billed by the agent of the Omaha and St. Louis Railway Company at Malvern, Iowa, to go by 'Kanawha Dispatch' from East Dubuque, Iowa. The 'Kanawha Dispatch' is said by appellant's counsel to be 'a combination of divers roads for the transmission of freight from western and eastern points,' and it is stated that the appellant is not a member of that combination. It is conceded, however, that 'the freight agent of the Illinois Central Railroad Company, and his corps of clerks transact all the routine business of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Kanawha Dispatch at Chicago,' but it is insisted that they get all their instructions, orders, etc., in relation to such business from the general agent of the so-called 'Big Four' company, and from the 'Kanawha Dispatch' offices, and not any from appellant.

"The two car-loads of potatoes in question came to appellant's yards in Chicago in due course, and were immediately transferred, as directed by the transfer slips, and forwarded by appellant over its own line to Kankakee the same day. It is not disputed that there was no delay in transit while the potatoes were on appellant's tracks. But there is some evidence, tending to show unnecessary delay on the part of the Chesapeake and Ohio, and of the Pennsylvania companies. The claim against appellant is, that a mistake was made by its employees at Chicago in billing, by which the potatoes were caused to be shipped *via* the Clyde line of steamers, instead of being forwarded all-rail. The way-bills were made out by appellant and were erroneous. They were made to read 'over Illinois Central and Chesapeake and Ohio to Richmond, for Philadelphia, *via* Clyde line of steamers.' They should have been billed 'to Charlottesville, Alexandria, all-rail to Philadelphia.' The error occurred through a mistake, inadvertently committed by the agent or employee at Chicago, who made out the bills. The result was that, upon arrival at Richmond, the potatoes, which were in bulk, were refused by the Clyde line of steamers, because, as the published tariff of rates of the 'Kanawha Dispatch' specifically states, bulk freight is not taken on the Clyde line. At Richmond the way-bills were corrected, and the potatoes at length forwarded to Philadelphia. There they were refused by the consignee on account of their condition, caused, it is said, by continued exposure to warm weather while delayed *en route*. There is evidence, tending to show that the cars, while in actual transit, made 'fair average time,' and that the delay was caused by the mis-billing."

From the judgment entered by the circuit court against appellant an appeal was taken to the Appellate Court, and the judgment has been there affirmed. The present appeal is prosecuted from the judgment of affirmance, so entered by the Appellate Court.

JOHN G. DRENNAN, (J. M. DICKINSON, of counsel,) for appellant:

For a mere nonfeasance an agent is not liable to any one but the master. Before the agent can be made legally liable to a third party the act of the agent must amount to positive misfeasance. 1 Am. & Eng. Ency. of Law, (2d ed.) 1133, 1134, and notes.

An agent is not liable to any one but his principal for the acts of his (the agent's) servants or for the acts of those employed by him in the service of his principal. *Stone v. Cartwright*, 6 T. R. 411; Story on Agency, (8th ed.) sec. 217a.

A servant or agent is not liable to a third person for a failure to perform the master's obligations to such third person. 14 Am. & Eng. Ency. of Law, 873, note 5.

A railroad company may act as an agent in the line of railroad business. 5 Thompson on Corp. sec. 5833.

In an action of tort against several defendants, if the jury return a joint verdict judgment should be rendered against them jointly. 11 Ency. of Pl. & Pr. 857.

A joint verdict not supported by evidence as to one must be set aside as to all. *Sperry v. Dickinson*, 82 Ind. 138; *Graham v. Henderson*, 35 id. 195.

A judgment of court must follow and correspond with and be only the legal result of the facts found in the verdict. The verdict is the basis of the judgment. *Mayfield v. State*, 40 Tex. 290; 1 Freeman on Judgments, (4th ed.) sec. 50d; *Thompson v. Albright*, 14 S. E. Rep. 1120.

The court cannot look to the evidence to determine what judgment it will render, but must look to the verdict alone. The judgment, if any is rendered, must follow the verdict. *Akin v. Jefferson*, 65 Tex. 137; *Fields v. Williams*, 91 Ala. 506; *Eams v. Stevans*, 26 N. H. 123.

If perishable goods are injured in transit on account of their own intrinsic qualities, the railway company is not liable for the goods so injured. Hutchinson on Carriers, (2d ed.) sec. 220.

JOHN M. ZANE, for appellees:

Where two railroads have a continuous line, dividing the freight between them, each railroad remains liable for negligence upon its own line. *Ellsworth v. Tartt*, 26 Ala. 733; *Irvin v. Railway Co.* 92 Ill. 103; *Peterson v. Railway Co.* 80 Iowa, 92; *Hart v. Railway Co.* 8 N. Y. 37; *Wyman v. Railroad Co.* 4 Mo. App. 35; *Hill Manf. Co. v. Railway Co.* 104 Mass. 122; *Railway Co. v. Spratt*, 2 Duv. 4; *Insurance Co. v. Railroad Co.* 104 U. S. 146.

Mistake by mis-billing that causes delay renders the railroad liable. *Railway Co. v. Niemann*, 84 Ill. App. 272.

If an agent is guilty of misfeasance, as distinguished from nonfeasance, the agent is liable to a third party injured by the act. *Bell v. Josselyn*, 3 Gray, 309; 1 Am. & Eng. Ency. of Law, (2d ed.) 131, 135.

The plaintiff in an action of tort can take judgment against as many defendants as he pleases, and may dismiss as to other defendants served, at any time before final judgment. *Boston v. Simmons*, 150 Mass. 461; *Stainbrook v. Duncan*, 45 Ill. App. 344; *Matthews v. Railroad Co.* 56 N. J. L. 34; 6 L. R. A. 629, note.

In actions of tort the court may enter judgment as to one without disposing of the case as to others. The defendant against whom judgment is taken cannot assign the fact as error. *Davis v. Taylor*, 41 Ill. 405.

The court may grant a new trial as to certain defendants found guilty of tort by the verdict, and enter judgment as to the others. *Albright v. McTighe*, 49 Fed. Rep. 817; *Houston v. Bruner*, 39 Ind. 376; *Smith v. Foster*, 3 Cold. 147; *Lee v. Fletcher*, 46 Minn. 49; *Terpenning v. Gallup*, 8 Iowa, 75.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The evidence in this case tends very strongly to show that the delay in the transportation of the potatoes from Malvern, Iowa, to Philadelphia, Pennsylvania,

was caused by the error of the Illinois Central Railroad Company, appellant herein, in improperly billing the potatoes upon their arrival at Chicago. The way-bills, made out by the appellant's agent at Chicago, read as follows: "Over Illinois Central and Chesapeake and Ohio to Richmond, for Philadelphia, *via* Clyde line of steamers." The potatoes should have been billed to go all-rail *via* Charlottesville, Virginia, or "to Charlottesville, Alexandria, all-rail to Philadelphia." The potatoes were in bulk, and the rate-sheet, which was in the possession of the appellant's agent, showed that such freight must go all-rail *via* Charlottesville, Virginia, and that the Clyde line of steamers did not take bulk freight. The result was that, when the cars reached Richmond, the freight was refused by the Clyde line of steamers, and the cars, after a considerable amount of telegraphing and correspondence in relation to the error, had to be shipped back from Richmond to Charlottesville, and from there on, by way of Alexandria, to Philadelphia. In consequence of the delay caused by this mistake, the cars did not arrive in Philadelphia until about May 6 and 8, respectively, when they should have arrived there certainly by the 25th day of April. The testimony tends to show, that the weather at that time was hot in Virginia, and that a delay of a few days causes potatoes shipped under such circumstances to sprout, so that they become spoiled. The potatoes were spoiled when they reached Philadelphia, although the proof tends to show that they were in a first-class condition when they left Malvern. They lay in Philadelphia because of the refusal of the consignee to receive them, and were there sold for freight charges. That an error was made by appellant's agent or employee in Chicago in the billing of the freight is established by testimony, which, so far as we have been able to discover, is uncontradicted by the appellant.

The first contention, however, of the appellant is that, in billing this particular freight, the appellant acted

as the agent of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; and that, on this account, the Illinois Central Railroad Company, if liable to anybody, is only liable to its principal, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. It is admitted, that the billing was the act of the agent or servant of the appellant, but it is said that the appellant, being the agent of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, is not liable to the appellees, who are third persons, but only to its principal for the act of billing thus performed by its own agent or servant. In other words, the contention of the appellant is, that whatever right of action in this case appellees may have is against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and not against the appellant, by reason of the alleged agency thus insisted upon. At the close of plaintiffs' evidence on the trial below, the defendant then moved to exclude the evidence; and again, at the close of all the evidence in the case, the appellant, the Illinois Central Railroad Company, asked the court to give a written instruction to the jury to find the appellant not guilty. The court refused the motion to exclude the evidence, and also refused to give the instruction so asked. The contention here made is claimed to arise out of this action of the court.

Upon the trial below, the appellant introduced in evidence a written contract, bearing date June 24, 1886, executed between itself, as party of the first part, and the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, as party of the second part. It is conceded, that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company is the successor of the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company. This written contract consists, in addition to the recital part thereof, of ten articles; and, so far as the relation between the parties to the contract is concerned, it is necessary to give a construction to the terms of the con-

tract. Although there are some expressions in the contract, which may be interpreted as indicating that the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, or its predecessor, was principal, and the Illinois Central Railroad Company its agent, yet, upon a consideration of the whole contract and all its parts, we are of the opinion that it does not show the relation of principal and agent to exist between the parties to it.

The contract recites, that "the respective parties hereto own and operate parts of a continuous line of railroad connecting at Kankakee, and extending from the city of Chicago in the State of Illinois to the city of Cincinnati in the State of Ohio." Each party is thus stated to own and operate its own part of such continuous line of railroad. A railroad, which owns and operates its own track between two given points, is itself liable to persons, shipping freight over it, for its own acts of negligence, or the negligence of its employees. Article 1 of the contract provides as follows: "It is agreed that the parties hereto shall operate their respective lines of roads, so connecting at Kankakee, for their mutual advantage, as allied lines of transportation." By the terms of the contract each party is thus to operate its own line of road, and both parties are to operate their respective lines as allied lines of transportation. Their relation is thus clearly indicated as allies, and not as agent or principal the one for the other. By the second article the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, otherwise known as the "Big Four," is required to do all its business both freight and passenger over the Illinois Central road between Kankakee and Chicago. The third article gives the control of the rates to the "Big Four." The fourth article requires the Illinois Central Railroad Company to furnish all necessary terminal facilities; but the cars, employed in the business of the line, are to be moved and handled by each party upon and over its own road, with its own engines, by its own train-

men; and mileage is allowed to each road for its cars run over the other road. The fifth, sixth and seventh articles refer to the passenger business. The eighth article provides, that freight earnings shall be divided between the two roads on traffic between Chicago and Cincinnati, twenty-five per cent to the Illinois Central Railroad Company, and seventy-five per cent to the "Big Four." The tenth article provides, that "all costs and damages incurred on account of loss or injury to freight shall be adjusted by the parties according to the general rules, usages and customs which shall prevail at the time in the interchange of freight traffic between the railroads of the United States." These provisions indicate that there was no intention to create an agency. As to all injuries to freight, and all mistakes of any kind in regard to freight, causing damage, the two roads were to be separately responsible, and not one as agent of the other. We do not decide that, under the terms of this agreement, a partnership existed between the two roads, although there was a unity of interest between them and an arrangement for the division of freights between them. We are satisfied that, under the authorities, each road is responsible, under the arrangement embodied in the contract, for the torts and negligence of its own agents or employees, whether each was responsible for the torts or negligence of the other, or not. (*Irvin v. Nashville, Chattanooga and St. Louis Railway Co.* 92 Ill. 103; *Peterson v. Railway Co.* 70 Iowa, 92; *Insurance Co. v. Railroad Co.* 104 U. S. 146; *C., H. & D. Ry. Co. v. Spratt*, 2 Duv. 4.) In *C., H. & D. Ry. Co. v. Spratt*, *supra*, it was held that: "Where several parties are associated for the transportation of freight from Louisville to New York, executing through bills of lading, and taking through freight, they will each be chargeable as common carriers between those points; and, in such cases, public justice and commercial policy require a stringent construction against any intermediate irresponsibility."

Under the circumstances, shown by the evidence in this case, the appellant, when it received the freight in question from the railroad company bringing it to Chicago, was undoubtedly the agent of the appellees, rather than the agent of the "Big Four." When the appellant received the freight in Chicago, it received it to be carried to a point beyond the terminus of its route, and to be delivered by it to a connecting carrier to be carried on its way to Philadelphia. Hutchinson, in his work on Carriers (2d ed. sec. 108), says: "When goods are delivered to the carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be delivered by him to a connecting carrier in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the first and each succeeding carrier becomes the agent of the owner of the goods to make delivery to the next carrier; and it is incumbent upon him to do so, not only to relieve himself from further liability, but because it is a duty which he owes to the owner, and which he has assumed with the acceptance of the goods. He is the party in charge of them, and the only one with whom the succeeding carrier can make the necessary arrangements, and stands towards them for this purpose in the position of an owner."

But, even if it be conceded that the appellant was the agent of the "Big Four," as is here claimed, it was an independent contractor, and, as such, liable for its own acts. Although the "Big Four" controlled the rates, the men, who did the work, were paid by the Illinois Central Railroad Company. It attended to the work of billing the cars at Chicago. It carried the freight to the end of its line by its own employees. As one of the witnesses says: "The Illinois Central crew hauled the freight from Chicago to Kankakee." Appellant and the "Big Four" evidently were running a continuous line, but each man-

aged that part of the line which was its part of such continuous line, and furnished all the cars, motive power, employees and depots for that part. Each company was bound to pay for losses occurring on its own line. The "Big Four," although controlling the rate of charges, did not pay the employees of the appellant; it did not superintend their work in the office; it did not direct the running of the trains; it did not handle the freight; it did not make out the way-bills. The appellant, being thus an independent contractor, even if it stood in the relation of an agent to the "Big Four" as its principal, was liable to third parties for its own negligence. (*Hale v. Johnson*, 80 Ill. 185; *Kepperly v. Ramsden*, 83 id. 354; *Pfau v. Williamson*, 63 id. 16; *Scammon v. City of Chicago*, 25 id. 424; *Hillyard v. Richardson*, 3 Gray, 349). Such an independent contractor is liable to a third party for the torts of its employees. (*Blake v. Ferris*, 5 N. Y. 48).

It is insisted, in behalf of the appellant, that the appellant, as agent of the "Big Four," was guilty of a mere non-feasance, and that an agent is not liable to any one but the master for a mere non-feasance. Counsel for the appellant refer to authorities, which hold that, "before the agent can be liable to a third party, the act of the agent must amount to positive mis-feasance." (1 Am. & Eng. Ency. of Law,—2d ed.—pp. 1133, 1134, and notes). If it be assumed that this is a correct statement of the law, and that the appellant acted merely as the agent of the "Big Four" in billing the freight in question, we think that appellant must be held to be liable to appellees as third persons, upon the ground that its act was an act of mis-feasance, and not merely of non-feasance. Where an injury results from such an act of negligence on the part of the agent as partakes of the character of a mis-feasance, the agent is personally liable to third persons, "the actual perpetrator of the positive wrong not being permitted to relieve himself from liability by showing that the wrong was done while he was acting

in the course of his employment as agent for another." (1 Am. & Eng. Ency. of Law,—2d ed.—pp. 1134, 1135). Bouvier defines non-feasance to be "the non-performance of some act which ought to be performed." He defines mis-feasance to be "the performance of an act, which might lawfully be done, in an improper manner, by which another person receives an injury." The appellant negligently billed the freight, so as to make it go to Richmond for Philadelphia *via* the Clyde line of steamers when it had in its possession rate-sheets, which showed that the Clyde line of steamers would not receive freight in bulk, such as this freight was. Under these circumstances, the mis-billing was an act of positive mis-feasance.

Second—The second contention of the appellant is, that the court below erred in granting a new trial to the Chesapeake and Ohio Railway Company, and the Pennsylvania Railroad Company, and permitting the suit to be dismissed as to these companies, and in entering judgment against the appellant alone, when the verdict was against the three companies, to-wit: the Chesapeake and Ohio Railway Company, the Pennsylvania Railroad Company, and the Illinois Central Railroad Company.

While the authorities are somewhat conflicting upon this branch of the case, yet the weight of authority sustains the action of the trial court. A plaintiff in an action of tort may take judgment against as many defendants as he pleases. The liability of tortfeasors is joint and several, and the person injured can select which of them he chooses to have judgment against. (*Stainbrook v. Duncan*, 45 Ill. App. 344; *Boston v. Simmons*, 150 Mass. 461).

In the Encyclopedia of Pleading and Practice (vol. 11, p. 853) it is said: "In actions of tort against several defendants, a judgment by default may be taken against a portion of the defendants though the rest make sufficient plea. And the court may, after the verdict, grant a new trial to one or more of several defendants if satisfied that

they were wrongly convicted and may render judgment upon the verdict as to the remainder." This statement of the text-writer is sustained by the following authorities: *Albright v. McTighe*, 49 Fed. Red. 817; *Terpenning v. Gallup*, 8 Iowa, 75; *Hayden v. Wood*, 16 Neb. 306; *Heffner v. Moyst*, 40 Ohio St. 112; *Houston v. Bruner*, 39 Ind. 376; *Lee v. Fletcher*, 46 Minn. 49; *Smith v. Foster*, 3 Cold. 147.

In *Terpenning v. Gallup*, *supra*, the Supreme Court of Iowa say: "The objection now is that, if the verdict was set aside as to one of the defendants, it should have been as to all—that it was an entirety—and that the judgment must strictly follow the verdict. We do not so understand the law. In this action, the jury could have found all the defendants guilty, or all not guilty, or a part guilty and the others not guilty. And after verdict, it was perfectly competent for the court to grant a new trial to one or more of the defendants, if satisfied that they were improperly convicted, and render judgment upon the verdict as to the others."

In the case at bar, appellant and the other two railroad companies against whom the verdict was rendered, each filed a separate plea. In *Heffner v. Moyst*, *supra*, it was held that it was not error, or to the prejudice of one of the defendants in an action of tort, to overrule his motion for a new trial, while sustaining a separate motion by the other defendants to set aside the verdict as to them.

In *Hayden v. Wood*, *supra*, which was an action of tort against a husband and wife, and where separate motions were made by them and overruled, and the contention in the Supreme Court was that, if the verdict against the wife could not be sustained, the husband also was entitled to a new trial, the court said: "If no other reason for the opposite rule could be assigned, we think one can be found in the separation of their motions for a new trial and their petitions in error, by which they have separated and severed their rights and interests. But

to our minds it is clear that the results claimed by the plaintiffs in error do not necessarily follow. While it is true that the defendant in error by his petition has proceeded against both jointly, it by no means follows that the verdict must be against both or neither. * * * A cause of action against both the plaintiffs in error is stated in each (of certain counts;) the proof makes a case against one of the plaintiffs in error, but in our opinion not as against the other. Could not the jury have found against one and not the other, and their verdict stand? If so, why cannot a new trial be granted to one and not the other? * * * Tort feorsors are jointly and severally liable. An action may be maintained against one or all at the option of the injured party. Several and separate judgments may be rendered in separate actions, but the satisfaction of one satisfies all, and to this extent only may their liability be said to be joint."

Section 23 of the Practice act of Illinois provides that, "at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, * * * discontinuing as to any joint plaintiff or joint defendant." (3 Starr & Cur. Ann. Stat.—2d ed.—p. 3000). In *Davis v. Taylor*, 41 Ill. 405, we held that, inasmuch as all torts are joint and several, there can be a judgment against one defendant without disposing of the case as to the others, and the defendant, against whom the judgment is taken, cannot assign the fact as error. In the latter case we said (p. 408): "It was held in *Dow v. Rattle*, 12 Ill. 373, which was an action of assumpsit, to be error to render final judgment against part of the defendants, without disposing of the case as to the others. * * * We are of opinion, that the rule should not be applied to actions of tort. There is no reason for thus applying it, because there is no contribution among wrongdoers. Taking a judgment against a portion of the defendants amounts to a dismissal of the case as to the residue, and, in actions *ex delicto*, this may be done.

If the mode of doing it is irregular, it is an irregularity which works no prejudice to those defendants against whom the judgment is taken. They should not, therefore, be permitted to assign it for error."

Third—It is contended that there was a variance between the evidence and the declaration, and that the trial court erred in refusing to exclude such evidence upon the motion to that end made at the close of the plaintiffs' evidence, and again after all the evidence was in.

Upon this branch of the case we concur in what is said by the Appellate Court in their opinion in this case, which is as follows (p. 398): "In *Swift v. Rutkowski*, 182 Ill. 18, where a similar motion was made at the close of plaintiff's evidence, the court said: 'It is a well settled rule that a party desiring to take advantage of a variance between the declaration and the evidence should object to the evidence when offered and point out wherein the variance consists, so that the other party may amend the declaration and thus avoid the objection. If this course is not pursued the objection to the evidence will be regarded as waived.' If the objection was so made in the present case our attention has not been called to it. It appears only to have been made after the plaintiffs had closed their evidence, when the right to make it had been waived. But aside from the waiver, we do not regard the objection as well taken. The proof substantially sustains the declaration as to the material averments and as to particulars essential to recovery."

The main ground of variance, complained of by appellant, is that the plaintiffs charged in their declaration a delivery of the freight to the defendants jointly at Chicago, when it was in fact a delivery to the appellant alone. We do not understand the declaration as charging the delivery to have been a joint delivery. If the proof showed a delivery to any one defendant at Chicago, the pleading was good as to that one; or, if the proof showed a delivery to a defendant at Chicago who

received the goods for the other defendant, it would still be a delivery as to all the defendants at Chicago. There was no variance in this case because all torts are joint and several, and the jury may find one or any guilty, or one or any not guilty. (*Baker v. Railroad Co.* 42 Ill. 73; *Indianapolis and St. Louis Railroad Co. v. Hackethal*, 72 id. 612; *Frink v. Potter*, 17 id. 406; *Swift v. Rutkowski*, *supra*). If A and B are tort feorsors, a delivery to A alone supports a judgment against him. In addition to this, the bills of lading, issued to appellees at Malvern, Iowa, show that the appellant became the agent of appellees to deliver the cars to the succeeding carriers. The law being that the carrier, who delivered these cars to the appellant at Chicago, was the agent of appellees, and made the delivery on their behalf, the delivery to appellant was in contemplation of law by the appellees through their agent, and there is no variance between the declaration and the proof on this point. (*Hutchinson on Carriers*,—2d ed.—sec. 108.)

Fourth—It is charged by the appellant, that the first instruction, given by the trial court for appellees, was erroneous upon the alleged ground that it enumerates a number of facts in favor of the appellees, and ignores the defense of appellant, that the mistake in billing was the mistake, not of appellant acting for itself, but as agent for the "Big Four." There was no error in the instruction in this regard. The question, whether or not the relation of principal and agent existed between the "Big Four" and the appellant, depended upon the construction of the written contract hereinbefore referred to. The interpretation or construction of written contracts is a question of law for the court, and not one of fact for the jury. (*Adams and Westlake Manf. Co. v. Cook*, 16 Ill. App. 161; *Kamphouse v. Gaffner*, 73 Ill. 453; *Belden v. Woodmansee*, 81 id. 25). Hence it would have been improper to submit to the jury, by an instruction given to them, the question whether the written contract between

the parties could be so construed, as to indicate that the relation of principal and agent existed between them. That this question was one of law for the court, and not of fact for the jury, was conceded by the appellant when it made its objection to all the evidence and thereby in effect asked the court to rule upon the contract as a matter of law.

Fifth—It is said that the court admitted improper evidence on behalf of the plaintiffs. A witness was asked what the condition of the car-load of potatoes, referred to in a certain letter shown to him, was when it arrived in Philadelphia, and he answered that the car-load of potatoes was in bad condition. It is said that this question called for a conclusion of the witness. We think that the condition of the potatoes upon their arrival in Philadelphia was a question of fact, and that the statement as to the condition of the potatoes, whether good or bad, was not a conclusion from their appearance. It is complained that the witness did not pretend that he had ever seen the potatoes. Whether or not he had seen them was ground for cross-examination; but his answer shows that he knew their condition. Moreover, the answer was given in a deposition taken upon notice; and the objection was one that could be obviated by better evidence, so that the proper method, in which it should have been urged, was by making a motion to suppress the deposition. No such motion was made before the trial, and it was too late to make it at the trial. (*Balkwill v. Bridgeport Wood Furnishing Co.* 62 Ill. App. 663.)

Some other objections are made to the evidence, but we do not regard them of sufficient importance to require further discussion.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE NATIONAL LINSEED OIL COMPANY

v.

THE HEATH & MILLIGAN COMPANY.

Opinion filed June 19, 1901.

1. COURTS—*duty of Appellate Court to recite facts—when not excused.* The duty of the Appellate Court to recite in its final judgment the ultimate facts as found by it, where its reversal of a judgment at law is the result of its finding the facts different from the trial court, is not excused by reason of the fact that the evidentiary facts were presented to the trial court in the form of a stipulation, in which such evidentiary facts were agreed upon but the ultimate fact was left open.

2. SAME—*facts need not be recited in Appellate Court's final judgment if ultimate facts are agreed upon.* If the parties agree upon the ultimate fact or facts the only questions for the courts are those of law, and if, in such case, the Appellate Court reverses and enters final judgment no recital of facts in such judgment is required to permit its being reviewed by the Supreme Court on appeal or error.

Heath & Milligan Co. v. Nat. Linseed Oil Co. 93 Ill. App. 13, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

The National Linseed Oil Company, a corporation of this State, engaged in the business of manufacturing and selling linseed oil, sold to the Heath & Milligan Manufacturing Company, another corporation, engaged in the business of manufacturing and selling paints, large quantities of linseed oil. The sales were made from time to time, extending over a period of more than five years. The contracts were for the sale and purchase of so many gallons of linseed oil. It was furnished by the seller on the basis of 7.5 pounds to the gallon and received and paid for by the purchaser, the National company claiming that it was accepted and paid for with the full knowledge on the part of the manufacturing company that it was furnished on that basis. After some twenty differ-

191	75
s99a	95

191	75
s197	682

191	75
200	1581

191	75
202	208
202	1884

191	75
207	1582
208	1164

191	75
209	1118

ent sales had been completed and a portion of the oil furnished on two other contracts, the Heath & Milligan Manufacturing Company, as it claims, discovered that a legal gallon of linseed oil, by weight, is 7.761 pounds. It thereupon demanded of the National company a repayment of the difference in value between the oil received and paid for at 7.5 pounds per gallon and 7.761 pounds per gallon, and also that in completing the two last contracts of sale the seller should furnish the last named weight for each gallon contracted for. Both requirements being refused, it brought suit to recover the alleged over-payment. Thereupon the National Linseed Oil Company brought its action to compel the manufacturing company to receive and pay for the oil under the last two contracts at 7.5 pounds to the gallon. By agreement the actions were consolidated under the title of the first suit, and submitted to the court, without the intervention of a jury, under a written stipulation of the parties. The stipulation sets forth, in substance, the pleadings in both actions, and states in detail the course of dealing between the parties, certain customs of the trade, and sets forth twenty-two contracts between the parties, and their correspondence extending over the period of their dealings. The three concluding paragraphs of the stipulation are as follows:

"If the court holds that under the contracts hereinbefore described the Heath & Milligan Manufacturing Company was entitled to receive but 7.5 pounds for a gallon of oil on all said deliveries, it is agreed that the amount due from said Heath & Milligan Manufacturing Company to the National Linseed Oil Company is \$4342.38.

"If the court holds that under said contracts said Heath & Milligan Manufacturing Company was entitled to receive 7.761 pounds for a gallon of oil on all of said deliveries, it is agreed the amount due said Heath & Milligan Manufacturing Company from the National Linseed Oil Company, after allowing all set-offs, is \$12,012.43.

"If the court holds that the Heath & Milligan Manufacturing Company was entitled to receive 7.761 pounds for a gallon only upon such contracts as were being performed at the time it claimed shortage, it is agreed the amount due said National Linseed Oil Company from said Heath & Milligan Manufacturing Company is \$702.70."

The plaintiff below, the manufacturing company, submitted propositions to be held as the law applicable to the case, but the court refused each of them. The defendant, the National company, submitted no propositions whatever, but the court found in its favor and assessed its damages at \$4342.38. The Heath & Milligan Manufacturing Company prosecuted an appeal to the Appellate Court for the First District. That court reversed the finding and judgment of the circuit court and entered a judgment *de novo* against the National Linseed Oil Company for \$12,012.43, with interest from November 18, 1899, and costs of suit. It incorporated no finding of fact in its final judgment.

W. W. GURLEY, and H. G. STONE, for appellant.

HOLLETT, TINSMAN & SAUTER, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This case must be remanded to the Appellate Court. By the mandate of the statute, if that court found the facts of the case wholly or in part different from the trial court, it was its duty to recite in its final judgment the ultimate facts as found by it, and its judgment would thereupon have become final and conclusive as to all matters of fact in controversy in the case. (3 Starr & Cur. Stat. chap. 110, sec. 87, p. 3114.) Having failed to recite any finding of the facts in its judgment, we must presume that it did not reach a different conclusion as to the facts from that of the circuit court, but reversed the judgment of the latter court for errors in the application

of the law to the facts. This has been so often decided by this court that a citation of the cases is unnecessary.

We do not understand counsel to controvert the proposition as applicable to all cases where the testimony is produced before the trial court by witnesses or in the form of depositions or documentary evidence, but they contend that this case is taken out of that general rule, because, as they say, the case was submitted to the trial court upon an agreed statement of facts. It is very clear that the alleged agreed statement of facts is no more than a stipulation between the parties as to what the testimony would have been if without the agreement it had been introduced before the court,—in other words, it is a stipulation as to the evidentiary or probative facts in the case, but is in no sense an agreement as to the ultimate or substantive facts upon which the determination of the case must depend. It is undoubtedly true that where the parties agree to the ultimate fact or facts in a case and submit it to a trial court for decision, the question before that court and on appeal to the Appellate Court, and finally to this court, presents only a question or questions of law; and in such case, if the Appellate Court reverses the judgment of the trial court and enters a final judgment, no recital of the facts found by it in its judgment is necessary upon appeal or writ of error to this court. But manifestly that is not this case. It is like the case of *Purcell Co. v. Sage*, 189 Ill. 79, and *Scovill v. Miller*, 140 id. 504, there cited.

The judgment of the Appellate Court will accordingly be reversed and the cause remanded to it, with directions to recite the facts as found in its judgment of reversal, or, if it reverses the case for errors of law, to remand it to the circuit court for another trial; and leave will be granted to withdraw the record of the circuit court filed here, for the purpose of re-filing it in the Appellate Court. The appellant must pay the costs of this appeal.

Reversed and remanded.

WILLIAM HUFFMAN

v.

MARY E. SHARER.

181	79
e208	589

Opinion filed June 19, 1901.

EQUITY—*when bill to set aside deed is properly dismissed.* A bill by a grantor to cancel a deed made some seven years before is properly dismissed where the evidence shows that the conveyance was made in pursuance of a well considered, thoroughly matured and long entertained purpose upon the part of the grantor and his wife to give the land to the grantee, their foster-daughter, subject only to their right to use and enjoy the same during their lives.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding.

SMITH & DANIELS, for plaintiff in error.

L. T. STOCKING, for defendant in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The plaintiff in error is a very old man, having reached the age of ninety-one years at the time of the hearing of this cause. His wife died November 15, 1899, at an advanced age. They lived together as husband and wife for more than fifty years, but no children were ever born to them. In 1862 the defendant in error, then about fourteen months of age, whose name or parentage the record does not disclose, was taken into their family as a member thereof. She was treated in all respects as their child and lived in the family as a daughter until she reached her eighteenth year, when she was married to John Sharer, her present husband, in the year 1878. The plaintiff in error and the husband of the defendant in error were farmers. After the marriage of the defendant in error she and her husband for a short time resided in the home of the plaintiff in error and then removed to a farm in the same neighborhood. The two families con-

tinued to live as neighbors, the plaintiff in error, his wife and the defendant in error conducting themselves toward each other as though the relation of parents and daughter actually existed between them, and on November 24, 1892, the plaintiff in error and his wife executed and delivered to the defendant in error a deed conveying to her the farm on which they then and for many years prior thereto had resided. The farm contained 160 acres of land, and is described as the north-east quarter of section 36, township 21, north, range 3, east of the fourth principal meridian, in Whiteside county, Illinois. The deed recited the conveyance was made in consideration of the sum of \$1000 in hand paid, and contained the following clause, viz.: "And as a further consideration the grantor is to retain possession of the premises during his lifetime, and the rents, benefits and use of the same shall accrue to them and each of them so long as they may live, and at their respective deaths all funeral expenses shall be borne and paid by the said Mary E. Sharer, or her heirs in case of her death; the grantor to pay all taxes assessed on said land so long as he retains possession as aforesaid." Some thirteen months after the execution of the deed the plaintiff in error rented his farm, and with his wife took up his abode in the family of the defendant in error and her husband, and they lived practically as members of her family for about a year and a half and then removed to another home. The plaintiff in error has remained in the possession and control of his home farm and received the rents and profits thereof, and still receives and enjoys such rents and profits.

In July, 1899, nearly seven years after the execution of the deed and more than five years after leaving the home of the defendant in error, the plaintiff in error filed this his bill in chancery to cancel the deed to the defendant in error. As grounds for the relief asked, the bill charged the execution of the deed was obtained by undue influence on the part of the grantee, and further alleged

as follows: "Your orator further represents that he did not intend, and does not intend, to give the aforesaid premises to said defendant, but he intended, as aforesaid, that said defendant should take care of him, your orator, and his said wife, for their natural lives in consideration for said premises as aforesaid." Answer was filed to the bill and replication to the answer, and the cause was referred to the master to take and report the proof and his conclusions of law and fact. The master reported the evidence produced by the respective parties and his findings and conclusions thereon, which were adverse to the complainant in the bill, and recommended that the bill be dismissed. Exceptions and objections which were preferred before the master to his report were renewed before the chancellor, but were overruled and a decree entered dismissing the bill. This is a writ of error to reverse the decree.

It appeared very clearly from the proofs that no undue influence was exercised by the defendant in error or operated to induce the execution of the deed. On the contrary, it was shown that the conveyance was made in pursuance of a well considered, thoroughly matured and long entertained purpose on the part of the plaintiff in error and his wife to give the home farm to their foster-daughter, the defendant in error, subject to their right to use and enjoy the same so long as they, or either of them, should live. Any other conclusion is wholly inadmissible from the proof, and counsel for the plaintiff in error do not, in their brief, otherwise contend. The contention of counsel for the plaintiff in error is, to quote from their brief: "That the defendant in error contracted and agreed with the plaintiff in error that she would furnish a home for and take care of and keep plaintiff in error and his wife for and during their natural lives as a consideration for said land, and that after about one year and three months' time turned plaintiff in error and his said wife away from her home, and has ever since neg-

lected and refused to care for them and furnish them a house as per their agreement."

We have consulted the testimony preserved in the record. The master and chancellor were, as we think, correct in their findings and conclusions as to the facts proven. Even if any reason had been shown to take the case out of the general rule that all anterior conversations are merged in the stipulations of the deed, (and no such reason was shown,) there was no proof either that there was an agreement that the makers of the deed should be furnished a home and cared for by the defendant in error as a part of the consideration for the conveyance, or that she had ever failed or refused to perform the conditions of such a contract, even had it been shown to have been made. At the time of the execution of the deed the grantor was possessed of horses, cattle, farming implements and of some \$2000 in money, and also owned a smaller tract of land. He retained the right to the rents and profits of the land for the benefit of himself and his wife during the lifetime of each of them. The farm rented for \$425 per year, and has yielded that sum to the plaintiff in error regularly year after year, and at the time of the trial the plaintiff in error was free of debt and had \$1000 in cash, some chattel property, the timber tract and the annual income of \$425 from the farm. In substance, all that was proven upon the subject of the care and support of the grantors was a remark made by the plaintiff in error while the deed was being prepared, to the effect he "was going to keep the use of the farm as long as he and his wife lived, and they would live on the farm as long as they could and then they expected to go and live with the defendant in error." They did afterwards make their home with the defendant in error, and were there welcome and well cared for without charge as long as they wanted to stay,—not because of any contractual obligation on the part of the defendant in error to provide for the old people, but because of her desire

to care for them and make them comfortable. Counsel for plaintiff in error do not point out any testimony tending to show that they had any reason or cause to leave the home of the defendant in error, and our examination of the proofs failed to disclose that any just reason or cause existed.

The bill did not pray for a reformation of the deed, but for the cancellation thereof. The court, without objection on the part of the defendant in error, advised the complainant and his counsel that if they would so amend the prayer of the bill as to warrant the court so to do, the court would make and enter a decree directing that the support, care, comfort, reasonable attendance and medical care of and for the complainant so long as he may live shall be made a lien and charge upon all the premises in said bill of complaint described, not only as to the rents, benefits and uses of the same as provided in said deed, but also upon the fee simple title thereto, directing and ordering that the complainant may reside at such place or places and with such person or persons as he may choose, and incur any and all reasonable and just charges and expenses, the same to be a lien and charge upon the said premises; and that in the event the said rents and income of said premises shall not be sufficient to meet and pay all and every such charge and expense, and the said defendant, Mary E. Sharer, or her heirs, shall not promptly meet and pay any and all deficit that may occur at any time therefor, (the amount of such deficit to be ascertained and declared by the court from time to time and directed paid by said Mary E. Sharer or her heirs,) then that such part or all of said premises shall be sold, under the order and direction of the court, as shall be necessary to pay such deficit and fully provide for the support, comfort and care of said complainant as hereinbefore set forth; that this cause should remain upon the docket for the purpose of taking such account, ordering such payment and making such

sale of said real estate from time to time, as occasion might require, and to make such other and further orders and decrees herein as should from time to time seem equitable and right. But counsel declined to frame the prayer for relief so as to warrant the court in decreeing this additional protection to the plaintiff in error, which was warranted only by the willingness of the defendant in error that it should be allowed.

The testimony of the plaintiff in error demonstrated that his mind has been greatly impaired by age and his memory and judgment much weakened, and his testimony, together with the other proofs in the case, fully warranted the finding of the master, which was approved by the court, that his present dissatisfaction with the terms of the conveyance was inspired by other interested parties who have ulterior designs to forward, which it is not to the best interest of the plaintiff in error should be promoted.

The decree will be affirmed.

Decree affirmed.

THE STANDARD OIL COMPANY

v.

JOHN J. MAGEE *et al.*

Opinion filed June 19, 1901.

TAXES—*when equity has no jurisdiction to enjoin tax.* Equity has no jurisdiction to enjoin a tax upon the ground that the board of assessors, without notice to complainant, fraudulently and wrongfully raised the amount of his assessment, and that the board of review refused to grant him a hearing although he filed a written protest against the fraudulent assessment, since it was complainant's duty to pursue his remedy by *mandamus* to compel the board of review to grant him a hearing.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. MURRAY F. TULEY, Judge, presiding.

ALFRED D. EDDY, for plaintiff in error.

JULIUS A. JOHNSON, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for defendants in error.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding by bill in equity, begun in February, 1900, by the Standard Oil Company, plaintiff in error here, in the circuit court of Cook county, to enjoin the collection of certain taxes assessed against its personal property situated at Ninety-fifth street and Marquette avenue, in the city of Chicago. The bill alleges that in April, 1899, the complainant filed with the board of tax assessors a correct schedule of its property located at that place, amounting to \$1401.63; that the board of assessors ignored the schedule, and without giving notice to the complainant fraudulently and wrongfully assessed it in the sum of \$30,000 full value on "merchandise" and \$20,000 full value on "all other property not enumerated;" that, upon learning of the raising of this assessment, complainant caused to be filed with the board of review a written protest against the fraudulent and unlawful assessment, but the board refused to grant complainant a hearing and arbitrarily and fraudulently confirmed the assessment, and that the collector of taxes is now threatening to enforce payment of the unlawful taxes so levied. The collector of the town of Hyde Park and the county treasurer of Cook county are made parties defendant to the bill. The prayer is that the unlawful assessment be set aside and that the collector and county treasurer be restrained from enforcing payment of the taxes. To this bill defendants filed a demurrer, which was sustained by the court. The cause is brought here by writ of error.

The theory of the bill is, that the action of the board of assessors in raising the assessment was unjust and

fraudulent. The matter was presented before the board of review for their consideration, but complainant was refused a hearing. The question for decision here is whether the complainant, under these circumstances, can have relief in equity against an assessment which is alleged to have been fraudulently made. A court of equity has no jurisdiction of this case as presented by the bill. The board of review is the tribunal to whom all such complaints should be made. If that board refuses to grant a hearing the law will compel it to perform its duty in that respect upon proper application, by writ of *mandamus*. Upon being refused a hearing before the board of review complainant did not pursue a remedy which the law affords and which is intended to be adequate for the relief of the tax-payer. As is said in the case of *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383 (on p. 394): "Fraud is a familiar ground of equity jurisdiction, and if an assessment is fraudulent, equity should relieve against it where the tax-payer has been diligent in seeking the remedy which the statute affords. In matters of revenue it is important that all questions should be speedily settled, and the tax-payer should first seek the remedy given by the statute, which it is presumed will be sufficient. If he fails to do so it is his own neglect or folly. The remedy against fraud is of an equitable nature, and should be applied where the injured party has been diligent for his own protection, but we think it should be withheld in a case of this kind, where the party has failed to insist upon a legal right which probably would have given full relief." See *White v. Raymond*, 188 Ill. 298, and cases cited; also *Coxe Bros. & Co. v. Salomon*, id. 571.

It appearing that complainant has failed to pursue a remedy which the law affords, the demurrer to the bill was properly sustained, and the order of the circuit court will accordingly be affirmed.

Order affirmed.

THE STATE BOARD OF HEALTH

v.

WILLIAM FRANK ROSS.

Opinion filed June 19, 1901.

191 87
102a 1892

1. **STATUTES**—*complete revision of a subject matter repeals prior act.* A statute which completely revises the subject matter of a prior act and provides a perfect system in itself, operates as a repeal of such prior act although it does not contain an express repealing clause.

2. **MEDICINE AND SURGERY**—*act of 1899, regulating practice of medicine and surgery, is the only one in force.* The act of 1887, to regulate the practice of medicine and surgery in Illinois, being a complete revision, repeals by implication the act of 1877; and since the act of 1899 (Laws of 1899, p. 273,) expressly repeals said act of 1887, the act of 1899 has become the measure of the power of the State Board of Health with respect to all matters embraced in the latter act.

3. **SAME**—*provisions of sections 2 and 6 of act of 1899 construed.* The provision in section 2 of the act of 1899, regulating the practice of medicine, (Laws of 1899, p. 274,) to the effect that no person "shall hereafter begin the practice of medicine" without first obtaining a license from the State Board of Health, by implication excludes persons practicing medicine prior to July 1, 1899, when the act took effect; and the provision in section 6 giving the board of health power to revoke "such certificates" refers only to certificates issued under the provisions of the act.

4. **SAME**—*board of health cannot revoke licenses issued prior to July 1, 1899.* The act of 1899, to regulate the practice of medicine, does not empower the State Board of Health to discipline holders of certificates to practice medicine issued prior to July 1, 1899, nor to revoke such certificates.

State Board of Health v. Ross, 91 Ill. App. 281, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

J. A. BARNES, and RUFUS COPE, for appellant.

JAMES LANE ALLEN, for appellee.

Per CURIAM: The opinion of the Appellate Court by Mr. Justice WINDES in disposing of this case is as follows:

"Appellee, a licensed physician and surgeon in Illinois since May 4, 1895, received a notice from appellant, the State Board of Health, on September 21, 1899, directing him to appear before said board to show cause why his certificate or license issued to him by the board should not be revoked for unprofessional and dishonorable conduct, setting out divers specifications of such alleged conduct. He filed his bill in the circuit court setting up these facts, and alleging that the board intended to revoke his certificate, that he was receiving profits and emoluments from his profession, and that the proposed action of the board would greatly and irreparably damage him, and praying an injunction against the board from proceeding against him to hear or adjudicate said charges or to revoke his certificate. The demurrer of appellant to the bill was overruled by the chancellor, and appellant refusing to plead further or to answer the bill, and electing to stand by its demurrer, the court entered a decree in accordance with the prayer of the bill, to reverse which this appeal is prosecuted.

"The question presented for decision is, whether, under the present act of the legislature of this State to regulate the practice of medicine, (Hurd's Stat. 1899, chap. 91,) in force July 1, 1899, the State Board of Health has power to discipline and revoke the certificates of persons who had been licensed to practice medicine and surgery by the board prior to that date.

"The first act in this State relating to the practice of medicine came in force July 1, 1877, and is entitled 'An act to regulate the practice of medicine in the State of Illinois.' It provides for medical examinations by a board of examiners to be appointed by the State Board of Health, and for the issuance of certificates to practice medicine, and section 10 of this act provides that the board may refuse certificates to individuals guilty of un-

professional or dishonorable conduct, and for a revocation of certificates for like causes, with an appeal to the body appointing the board. Another act relating to the practice of medicine was enacted, approved June 16, 1887, and in force July 1, 1887, section 9 of which provides that the board of health may refuse to issue the certificates provided for in section 2 of the act to individuals guilty of unprofessional or dishonorable conduct, and that it may revoke such certificates for like causes, and in case of refusal or revocation, for an appeal to the Governor. Section 12 of this act contains the provision, 'all persons holding a certificate on account of ten years' practice shall be subject to all the requirements and discipline of this act and the act to which this is an amendment, in regard to their future conduct in the practice of medicine, the same as all other persons holding certificates.' Section 14 is as follows: 'All acts and parts of acts inconsistent or in conflict with this act are hereby repealed.'

"The present act on this subject, which went into force July 1, 1899, is entitled 'An act to regulate the practice of medicine in the State of Illinois, and to repeal an act therein named.' The repealing clause of this act (section 12) is as follows: 'An act to regulate the practice of medicine in the State of Illinois, approved June 17 (16), 1887, in force July 1, 1887, and all other acts and parts of acts inconsistent with this act, are hereby repealed.' Section 6 of the act of 1899 is as follows: 'The State Board of Health may refuse to issue the certificates provided for in this act to individuals who have been convicted of the practice of criminal abortion, or who have by false or fraudulent representation obtained or sought to obtain practice in their profession, or by false or fraudulent representation of their profession have obtained or sought to obtain money or any other thing of value, or who advertise under other names than their own, or for any other unprofessional or dishonor-

able conduct, and the board may revoke such certificates for like causes: *Provided*, that no certificate shall be revoked or refused until the holder or applicant shall be given a hearing before the board.'

"The present act purports by its title to be a complete revision of the subject matter of the practice of medicine, and by its various provisions indicates that it was so intended. Section 2 provides that 'no person shall hereafter begin the practice of medicine, or any of the branches thereof, or midwifery, in this State without first applying for and obtaining a license from the State Board of Health to do so,' and details the manner in which a license may be obtained. Subsequent sections provide as to when the license shall issue; that it should be recorded in the office of the county clerk where the licensee resides or practices, within three months of its date, where a list of licenses should be kept; fees for examination and issuing the license; who should be regarded as practicing medicine within the meaning of the act, and license fees to be paid by itinerant vendors of drugs. Section 9 provides severe penalties to be imposed on any person practicing medicine or surgery in the State 'without a certificate issued by this board in compliance with the provisions of this act,' and further, 'that this section shall not apply to physicians who hold unrevoked certificates from the State Board of Health issued prior to the time of the taking effect of this act.'

"It is claimed by counsel for appellant that the words 'such certificates,' in section 6 of the present act, are a substitute for and mean certificates or licenses to practice medicine, and that it was intended by the legislature to include in the words 'such certificates' all certificates issued by the board of health prior to July 1, 1899, and that the holders of all certificates issued prior to that date are subject to discipline by the board, as provided by the present act, to the same extent and in the same manner as the holders of certificates issued since that

date by the board; also, that if the act of 1899 only relates to certificates issued under that act, then that section 10 of the act of 1877 must be held to be still in force, and to give the board the power to revoke certificates issued prior to July 1, 1899.

"An examination of the act of 1887 shows that it is a complete revision of the whole subject matter of the former act of 1877, is a complete and perfect system in itself, and, as we have seen, was an act to regulate the practice of medicine in the State of Illinois, and gave power to the board of health to revoke certificates of persons licensed under the act, for unprofessional or dishonorable conduct. This being so, the act of 1887 operated as a repeal of the act of 1877, without any reference to the express repealing clause contained in the former act. (*Culver v. Third Nat. Bank*, 64 Ill. 528, and cases there cited; *Devine v. Board of Comrs.* 84 Ill. 590; *People v. Town of Thornton*, 186 id. 162; *Sutherland on Statutory Const.* sec. 156; *Norris v. Crocker*, 13 How. 438.) In the *Devine case* the court say: 'A subsequent statute revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former.' In the very recent case of *People v. Town of Thornton*, *supra*, the Supreme Court say: 'Where the legislature frames a new statute upon a certain subject matter, and the legislative intention appears from the latter statute to be to frame a new scheme in relation to such subject matter and make a revision of the whole subject, there is, in effect, a legislative declaration that whatever is embraced in the new statute shall prevail and that whatever is excluded is discarded. The revision of the whole subject matter by the new statute evinces an intention to substitute the provisions of the new law for the old law upon the subject.'

"It follows that the claim that the act of 1877 is still in force is untenable, as it is repealed by the act of 1887.

The present act, as has been seen, besides being a complete revision of the whole subject matter of the act of 1887, has an express clause repealing the latter act, and therefore we have only to consider the power of the State Board of Health under the present act.

"The provision in section 2 above quoted, to the effect that no person shall hereafter begin the practice of medicine without first obtaining a license from the State Board of Health, by implication excludes persons practicing medicine prior to the date July 1, 1899, when the act went into effect. The provision in section 4 requiring the certificate or license to be recorded in the county clerk's office within three months from its date, was evidently intended to apply to certificates issued under the act. The provision in section 6 giving the board power to revoke 'such certificates,' plainly refers to certificates issued under the act, because the part of the section relating to the revocation of certificates is contained in one sentence, the first part of which says: 'The State Board of Health may refuse to issue the certificates *provided for in this act,*' and there is no language in the sentence or in this section of the act referring to any other certificates. Section 9, which prescribes the penalty for practicing medicine or surgery, relates to certificates 'issued by this board in compliance with the provisions of this act,' and, as we have seen, the same section provides that it shall not apply to physicians holding certificates issued prior to the time of the taking effect of the act.

"If it was the intention of the legislature to give the board of health the power to discipline the holders of certificates issued prior to July 1, 1899, and to revoke such certificates, it has certainly failed to express such intention by this act. We are of opinion that the language of the act is too plain to admit of the construction contended for by appellant. When the language of a statute is clear and plain there is no room for construction, and we are not at liberty to speculate upon what

was the intention of the legislature. *Martin v. Swift*, 120 Ill. 488; *Ottawa Gas Light Co. v. Downey*, 127 id. 201; *Chicago, Milwaukee and St. Paul Railroad Co. v. Dumser*, 109 id. 402; Sutherland on Statutory Const. secs. 235-238.

"If the consequences of interpreting the statute according to its plain and obvious meaning are likely to prove disastrous to the people of the State at large, as contended by counsel and as would seem not improbable, considering the large number of physicians and surgeons throughout the State and the temptations to obtain money and practice by a resort to dishonorable conduct which are supposed to beset professional men, the responsibility must rest with the legislature, and not the courts. If the tendency of a law is vicious, the stricter its enforcement the sooner it will be amended or repealed. This statute is in its nature highly penal, should be strictly construed, and should not be held to include persons not clearly and plainly within the scope of its provisions. *People v. Peacock*, 98 Ill. 172; *Siegel v. People*, 106 id. 89; Potter's Dwarrior on Stat. 245; Sutherland on Statutory Const. sec. 208.

"We do not discuss the several principles in the construction of statutes referred to in the brief of counsel for the appellant, for the reason that in our opinion the principles of construction above stated are controlling in this case.

"The decree of the circuit court is therefore affirmed."

We have carefully examined all of the questions involved, and considered the criticisms of the opinion by counsel and their arguments against the correctness of the same, and are of the opinion the conclusions reached and announced in the opinion are correct.

The opinion of the Appellate Court is adopted as the opinion of this court, and the judgment of this court is affirmed.

Judgment affirmed.

GEORGE S. FOSTER, Exr.

v.

THE ST. LUKE'S HOSPITAL.

Opinion filed June 19, 1901.

1. PLEADING—*what necessary to allege in action for accidental death.* In an action to recover damages for the death of a person, the plaintiff, in order to be entitled to recover, must allege and prove that the deceased left surviving a husband or wife or next of kin.

2. SAME—*effect of failure to allege that the deceased left next of kin—limitations.* If a declaration as originally filed in an action for the death of the plaintiff's testatrix fails to allege that the deceased left surviving a husband or next of kin, the declaration fails to state a cause of action, and an amendment filed more than two years after the accident, which alleges that the plaintiff is the surviving husband and sole heir and beneficiary of the deceased, is barred by the Statute of Limitations.

3. SAME—*when defect in pleading is not cured by verdict.* If the declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the facts which are alleged, a verdict for the plaintiff does not cure the omission.

St. Luke's Hospital v. Foster, 86 Ill. App. 282, affirmed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. GEORGE W. BROWN, Judge, presiding.

BEACH & BEACH, and M. SLUSSER, for plaintiff in error.

SYDNEY RICHMOND TABER, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action on the case brought by George S. Foster, executor of the last will and testament of Candis Foster, deceased, against the St. Luke's Hospital, to recover damages for the death of said Candis Foster, which was caused by her falling from the fifth story window of

191 94
298a *109

191 94
110a * 84

191 94
212 *574
214 *245
114a *259

said hospital on December 6, 1895. The suit was commenced February 27, 1896, and on the following 10th day of April a declaration was filed, in which the plaintiff failed to allege his relationship to Candis Foster, or that she left her surviving a husband or next of kin, or that any one had sustained any pecuniary loss because of her death. On November 2, 1898, the plaintiff filed an amendment to each count of the declaration, in which it was averred "that said George Foster is the husband and only surviving heir and beneficiary of the said Candis Foster, deceased," and "that said George S. Foster, plaintiff and surviving heir and beneficiary of the said Candis Foster, deceased, became and was deprived of the services and companionship of his said wife." A demurrer to the amended declaration having been overruled, the defendant filed the general issue and a plea of the Statute of Limitations thereto, to which latter plea the court sustained a demurrer, whereupon the case was tried before a jury, and a verdict and judgment were rendered in favor of the plaintiff for \$2500, from which judgment the defendant prosecuted an appeal to the Appellate Court for the First District, which court reversed said judgment without remanding the cause, and the plaintiff has sued out a writ of error from this court to review such judgment of reversal.

At the time the amended declaration was filed more than two years had elapsed since the accident took place. If the original declaration failed to state a cause of action and by the amendment thereto a new cause of action was sought to be introduced, the same was barred and the plea of the Statute of Limitations thereto should have been sustained. (*Phelps v. Illinois Central Railroad Co.* 94 Ill. 548; *Chicago, Burlington and Quincy Railroad Co. v. Jones*, 149 id. 361; *Eylenfeldt v. Illinois Steel Co.* 165 id. 185; *Chicago City Railway Co. v. Leach*, 182 id. 359.) The controlling question therefore is, did the original declaration state a cause of action?

This court has uniformly held that where an action is brought to recover damages for the death of a person, to entitle the plaintiff to recover it is necessary to allege and prove that such deceased person left him or her surviving a widow or husband or next of kin. (*Chicago and Rock Island Railroad Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 id. 68; *Lake Shore and Michigan Southern Railway Co. v. Hessions*, 150 id. 546.) In *Chicago and Rock Island Railroad Co. v. Morris*, *supra*, on page 402 the court say: "Before a party suing for these damages can be allowed to recover, it must be alleged in the declaration, and proved, that the deceased left a widow or next of kin, to whom the damages could be distributed." In *Quincy Coal Co. v. Hood*, *supra*, on page 72 it is said: "The fact of the survivorship of a widow or next of kin, being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration." And in *Lake Shore and Michigan Southern Railway Co. v. Hessions*, *supra*, it is held (p. 556): "It is the settled law that the fact of survivorship of a widow or next of kin is an essential element to the cause of action, and it is therefore indispensable that it should be alleged and proved."

At the common law no action could be maintained for negligently causing the death of a human being, or for any damages suffered by any person in consequence of such death. An action to recover such damages can be maintained, therefore, only by virtue of the statute. (Hurd's Stat. chap. 70.) It must be brought in the name of the personal representative of the deceased, and can only be maintained for the benefit of the persons designated in the statute. If the deceased left him surviving no widow or next of kin there is no cause of action, hence the necessity of alleging and proving that the deceased left him surviving a widow or next of kin. A declaration defective in this regard would not be good even after verdict. In *Bowman v. People*, 114 Ill. 474, it is said (p. 477): "The rule is, if the declaration omits to allege any sub-

stantial fact which is essential to a right of action, and which is not implied in or inferable from the findings of those which are alleged, a verdict for the plaintiff does not cure the defect." In *Quincy Coal Co. v. Hood*, *supra*, proof was made that there was next of kin other than those named in the declaration. This was held to be error and not cured by verdict.

We are of the opinion the declaration, as originally filed, stated no cause of action, and that the cause of action stated in the amended declaration was barred by the Statute of Limitations. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

JOHN MORE *et al.*

v.

MATILDA MORE.

Opinion filed June 19, 1901.

APPEALS AND ERRORS—*when appeal in will case lies to Supreme Court.* If a will disposes of the fee of the testator's real estate, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court upon the ground that a freehold is involved.

More v. More, 92 Ill. App. 465, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

O. E. HARRIS, and E. B. Mitchell, for appellants:

Where a will devises real estate as it would not descend under the statute, a freehold is involved. *Bice v. Hall*, 21 Ill. App. 298; *Moyer v. Swygart*, id. 497; *Newberry v. Blatchford*, 106 id. 584.

The statute requires a party producing a will for admission to probate in the county court to prove nothing but its formal execution, and that the testator was of sound mind and memory at the time it was executed. *Yoe v. McCord*, 74 Ill. 33.

It is incumbent upon those who claim under a will to prove not only its due execution, but that the testator was of sound and disposing mind. *Comstock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254.

The burden of proof of the sanity of a testator is on the proponents of a will. *Carpenter v. Calvert*, 83 Ill. 62; *Trish v. Newell*, 62 id. 196; *Hesterberg v. Clark*, 166 id. 241; *Pendlay v. Eaton*, 130 id. 69; *Crowninshield v. Crowninshield*, 2 Gray, 527; *Entwistle v. Meikle*, 180 Ill. 9; *Aikin v. Weckerly*, 19 Mich. 482; *McGinnis v. Kempsey*, 27 id. 363; *McMechen v. McMechen*, 17 W. Va. 683.

JOHN FULLER, for appellee:

In the matter of probate of a will, where an appeal is taken the proper course is from the county court to the circuit court, from the circuit court to the Appellate Court, and from the Appellate Court to the Supreme Court. *Hobart v. Hobart*, 154 Ill. 610.

It is not indispensable that witnesses to a will should subscribe any formal clause of attestation. 1 Redfield on Wills, (4th ed.) 232; *Robinson v. Brewster*, 140 Ill. 649.

The attestation clause may consist of a single word, as "witnesses" or "attest." 1 Redfield on Wills, (4th ed.) 232; *Robinson v. Brewster*, 140 Ill. 649.

Where the witnesses to a will are dead, secondary evidence may be used to prove the due attestation and execution of the will. The attestation is then to be shown as it would in cases of deeds, by proof of the handwriting of the witnesses; and it is to be presumed that the deceased witnesses have duly attested the will in the presence of the testator. *Hobart v. Hobart*, 154 Ill. 614; Hurd's Stat. 1899, sec. 6, p. 1747.

Per CURIAM: George More, of DeWitt county, died on or about the 27th day of September, 1898, and soon thereafter, on the petition of his widow, his will was admitted to probate by the county court of that county. Certain heirs of the deceased appealed to the circuit court, where, after a hearing before that court, an order was entered refusing probate and dismissing the petition. On appeal by the proponent, taken to the Appellate Court for the Second District, the order of the circuit court was reversed and the cause was remanded, with directions to enter an order admitting the will to probate and record as the last will and testament of said George More, deceased, and granting letters testamentary to the petitioner, as prayed. From the judgment of the Appellate Court the contestants have taken this appeal.

A motion was made by contestants in the Appellate Court to dismiss the appeal to that court on the ground that a freehold was involved and that the appeal should have been taken from the circuit court directly to this court. The will by its terms disposed of the real estate of the testator, devising it in fee, and we are of the opinion that a freehold was involved and that the Appellate Court had no jurisdiction, but that the appeal should have been taken from the circuit court directly to this court. (*Gould v. Theological Seminary*, 189 Ill. 282.) It follows that the Appellate Court erred in not dismissing the appeal to that court, and we cannot do otherwise than reverse its judgment.

The judgment of the Appellate Court will therefore be reversed and the cause remanded to that court, with directions to dismiss the appeal. Leave will be given to withdraw record, abstracts and briefs.

Reversed and remanded, with directions.

CHARLES ANDERSON

v.

FREDERICK MAGNI ANDERSON *et al.**Opinion filed June 19, 1901.*

1. **WILLS**—*intention must be gathered from language used, in the light of attending circumstances.* The intention of the testatrix must be gathered from the language used in the will, in the light of the attending circumstances, and not from any supposed intention existing in her mind, as explained by the testimony of one of the witnesses to the will.

2. **SAME**—*stipulation of facts in will construction case not binding upon minor heirs.* In a suit to construe a will, brought by the husband of the testatrix against her minor heirs-at-law, a stipulation of facts which are claimed to throw light upon the intention of the testatrix is not binding upon such minors.

3. **SAME**—*construction which renders will inoperative should be avoided, if possible.* If such a conclusion can be avoided, it is not to be presumed that a testator intended by the will to accomplish that which the law would do without any will.

4. **SAME**—*language of will construed.* A will drawn by a wholly inexperienced person, which gives to the husband of the testatrix all real and personal property, "to have and to hold unto 'my' or our son's, his heirs and assigns forever," must, where the proof shows there were three sons, be construed as giving the property to the husband with a limitation to the heirs of the bodies of the testatrix and her husband, which, under section 6 of the Conveyance act, passes a life estate to the husband with remainder in fee simple absolute to said heirs.

APPEAL from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

AMZI W. STRONG, and LOUIS C. EHLE, for appellant.

WILLIAM F. STRUCKMANN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Annie Anderson held the title to certain real estate in the city of Chicago. She died June 3, 1896, leaving a last will and testament, as follows:

"CHICAGO, ILLINOIS, *March 3, 1896.*

"I give, demise and bequeath unto my husband, Chas. Anderson, all real estate and personal property, with all the tenements and improvements thereto belonging; to have and to hold unto 'my' or our son's, his heirs and assigns forever.

"In witness whereof I have hereunto set my hand and seal this third of March, 1896.

ANNIE ANDERSON. [Seal.]

EDWARD SJOGREN,
JOHN ANDERSON."

The will was admitted to probate. She left surviving her the appellant, Charles Anderson, her husband, who was appointed administrator with the will annexed. Frederick Magni Anderson, Marten Henry Anderson and Ernst Edwin Anderson, the minor sons of appellant and the testatrix, are her only heirs-at-law. The bill in this case was filed by the appellant in the superior court of Cook county against the appellees, said heirs-at-law and the holders of encumbrances on the property, to obtain a construction of the will. A guardian *ad litem* was appointed for the minor defendants and filed their answer. The court entered a decree finding said heirs-at-law to be the owners in fee simple of said real estate, subject to said encumbrances and to the dower of appellant as surviving husband.

The complainant, Charles Anderson, was a merchant tailor in Chicago, and he went to his cutter, Axel W. Swanson, Jr., and asked him to write the will, giving him a book called "Gaskell's Compendium of Forms." Complainant had selected a form and marked it, suggesting certain changes, and the cutter copied the will in part from that form, attempting to adapt it to the intended purpose. Complainant gave testimony, and there was also a stipulation of facts which are claimed to throw light upon the intention of the testatrix, but neither such testimony nor the stipulation can be considered. Complainant was not a competent witness under the statute, and the stipulation was not binding on the minors. (*Turner v. Jenkins*, 79 Ill. 228.) There was

testimony of one of the witnesses to the will that the testatrix supposed that the will devised the property to complainant, but her real intention must be gathered from the language used in the will in the light of the attending circumstances, and not from any supposed intention existing in her mind. The purpose of construction is to ascertain the intention of the testatrix from all the words and provisions of the will, giving effect, if possible, to every word. *Jenks v. Jackson*, 127 Ill. 341.

The construction contended for in behalf of the heirs-at-law and adopted by the superior court is, that the will gave all the property of the testatrix to complainant for the use of her heirs-at-law; that the statute executed the use, and consequently the devise was to the heirs-at-law. This construction renders the will void, as doing what the law would have done without any will. If there had been no will the property would pass precisely according to the decree of the superior court, and it is not to be presumed that the testatrix intended to do that which the law would do without any will, if that conclusion can be avoided. The latter part of the will is ambiguous, having been drawn by a Swede tailor wholly unskilled in such matters, but the first part is clear and definite. The testatrix first gave all her real and personal property to her husband, the complainant, Charles Anderson. Under section 13 of the Conveyance act the language employed will devise an estate in fee simple if a less estate is not limited by express words or does not appear to have been devised by construction or operation of law. There is a limitation in the *habendum* to certain heirs. In order to sustain claims of the respective parties as to this limitation, we are asked, on the one hand, to eliminate the words "my or our son's," and on the other hand to change the word "his" to "their," and in each instance because the words were put in by an unskillful draftsman. We are not authorized to eliminate or change either or any of the words intentionally used

by the testatrix. The limitation was to the heirs of the testatrix, as evidenced by the word "my," who should also be heirs of her husband, as shown by the word "his." They were to be her heirs and his heirs, and the testimony shows that there were three sons of the testatrix and complainant. In describing these heirs she also said, "or our son's." This was written as though there was but one son, and being in the possessive case, would refer to the heirs of a son. The proof being that there were three sons, it is evident that the apostrophe was misplaced, and that it should follow the word "sons." The case is like that of *Schaefer v. Schaefer*, 141 Ill. 337, where, through mistake or ignorance, the word "their" was spelled "there." Whatever may have been the precise intention in the use of that word, it seems clear that the limitation was to the heirs of the testatrix and her husband, and that the reference to the sons was in an explanatory way, as being the heirs. There was no attempt by the will to create a trust for the sons, but the intention was to describe the class of heirs.

The only meaning we can give the language of the will is that it gave the property to the complainant, Charles Anderson, with a limitation to the heirs of the bodies of said Charles Anderson and the testatrix. By section 6 of the Conveyance act an estate in fee tail becomes an estate for the natural life of the complainant, Charles Anderson, with remainder in fee simple absolute to said heirs. While the question is not free from difficulty, this is the only method by which we can give effect to all the language of the will and make it operative as a will.

The decree of the superior court is reversed and the cause is remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded.

THE NORTH CHICAGO STREET RAILROAD COMPANY

v.

MARY A. HUTCHINSON.

Opinion filed June 19, 1901.

1. INSTRUCTIONS—*statement as to what was charged in dismissed counts is surplusage.* If an instruction tells the jury, in clear and positive terms, that certain counts of the declaration have been dismissed, an attempted statement therein of what was charged in the dismissed counts is surplusage, and is not ground for reversal although incomplete.

2. SAME—*when instruction does not authorize a recovery on dismissed counts.* An instruction authorizing the jury to find for the plaintiff if "the plaintiff has made out her case by a preponderance of the evidence as laid in the declaration or any single count thereof," is not misleading, as authorizing a recovery under certain counts which were dismissed before the instruction was given, where other instructions state that such counts have been dismissed.

North Chicago St. R. R. Co. v. Hutchinson, 92 Ill. App. 567, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

JOHN A. ROSE, and LOUIS BOISOT, Jr., (W. W. GURLEY, of counsel,) for appellant.

FRANCIS J. WOOLLEY, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is an action in the Cook circuit court to recover damages for a personal injury sustained by Mary A. Hutchinson by reason of being thrown from a car of the North Chicago Street Railroad Company. The declaration consisted of four counts, but at the conclusion of the evidence plaintiff dismissed as to the second and third, and the cause was submitted to the jury upon only the

191	104
101a	1582
191	104
102a	194

191	104
200	1115
200	116
e200	268

191	104
107a	1619

first and fourth. The jury returned a verdict of guilty, assessing plaintiff's damages at \$5000, and from a judgment of affirmance in the Appellate Court for the First District the railroad company prosecutes this further appeal.

The only question submitted for our consideration here is, whether or not the trial court committed error in giving the plaintiff's first instruction and in refusing to give the defendant's twenty-fifth and twenty-sixth as asked, but giving the twenty-fifth as modified.

The first instruction given on behalf of the plaintiff is as follows:

"The court instructs the jury that if they find, from the evidence, that the plaintiff has made out her case by a preponderance of the evidence, as laid in her declaration or any single count thereof, then the jury should find for the plaintiff."

The contention of the appellant is, that this instruction authorized the jury to find for the plaintiff if she had made out her case under either of the dismissed counts,—that is, the second or third. At the time the instruction was given the second and third counts had been eliminated from the declaration by the dismissal, and it can hardly be assumed that the jury would understand the instruction to refer to such dismissed counts. By its own instructions the defendant speaks of the declaration substantially in the same language that the plaintiff did in her first instruction, making no reference to the fact that the second and third counts had been dismissed. But we think it clear that in no view of the case can it be said that the jury was misled by this first instruction as to the counts of the declaration then before it. The twenty-fifth and twenty-sixth instructions asked by the defendant were as follows:

25. "The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover on the third count of her declaration, and it is the duty

of the jury to find the defendant not guilty as to the said third count.

26. "The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover on the second count of her declaration, and it is the duty of the jury to find the defendant not guilty as to the said second count."

By refusing the twenty-sixth instruction and modifying the twenty-fifth the court undertook to state in one instruction what was contained in both, the twenty-fifth as modified and given being in the following language:

"The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover on the second and third counts of her declaration, the plaintiff having dismissed as to them. These counts charged, in substance and effect, that the door of the car was in such faulty and defective condition that the plaintiff was unable to enter the car through the said door, and that for said reason the plaintiff was compelled to stand upon the platform and thus be exposed to danger."

The first sentence of this instruction told the jury, in direct and positive terms, that the second and third counts of the declaration had been dismissed, and if it had concluded with that statement there could have been no claim that the instructions, taken together, were calculated to mislead the jury to the belief that the plaintiff could recover if she had made out her case under either said second or third count. While it is true that the concluding part of this modified instruction, which attempts to state what the second and third counts alleged, does not do so fully, yet that part of the instruction is mere surplusage and could not have prejudiced the defendant. The jury having been expressly told that those counts had been dismissed, it was a matter of no consequence to the jury what they contained.

On the whole, we are of the opinion that there was no error in the giving of the first instruction on behalf

of the plaintiff, and that the modification of the twenty-fifth asked by the defendant sufficiently covered the propositions asked in the twenty-fifth and twenty-sixth, and hence the refusal to give the twenty-sixth and the modification of the twenty-fifth were not error.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

FERDINAND SIEGEL *et al.*

v.

HARRIET BLAIR BORLAND.

Opinion filed June 19, 1901.

1. MORTGAGES—*purchaser of mortgaged property not personally liable unless he assumes the debt.* The purchaser of mortgaged premises is not personally liable for the debt in case of a deficiency unless there is a contract upon his part, express or implied, amounting to an agreement to pay the mortgage debt or some part thereof.

2. SAME—a *promise to pay mortgage debt may be implied.* If the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for the premises, and he retains that part of the purchase price, the law will create a personal liability against him, upon the ground that he has agreed to pay such indebtedness.

3. SAME—*encumbrance must be expressly assumed or amount must be allowed in purchase price.* In order to create a personal liability on the part of the purchaser of mortgaged premises there must be an express assumption of the indebtedness or the amount must be allowed in the purchase price, so that the law will imply a promise.

4. SAME—an *implied promise cannot exist where there is a contrary express agreement.* The implied contract to pay to the holder of an encumbrance money retained for that purpose by the grantee, arises only from the presumed understanding of the parties, and cannot exist where there was an express understanding to the contrary and a distinct refusal by the grantee to pay the debt.

Siegel v. Borland, 93 Ill. App. 320, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

191	107
e212	*164
213	*891
e218	*895

BINSWANGER & JACKSON, and JAMES E. MUNROE, for appellants.

WILSON, MOORE & MCILVAINE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Harriet Blair Borland, and Frederick W. Crosby, as trustee, filed their bill in this case in the circuit court of Cook county to foreclose a trust deed made by Louise C. Clark and husband, conveying to said trustee a lot with an apartment building thereon, known as "The Cambridge," to secure a note for \$75,000, with six per cent interest. The bill as finally amended sought to hold subsequent owners of the property personally liable for the debt, and charged that the premises were conveyed to Annah B. Peck, who conveyed the same to Thomas B. Bryan, who in turn conveyed them to Howard P. Simmons, and that each of the successive grantees expressly agreed to pay said debt secured by the trust deed. It was also sought, upon other grounds, to hold the appellants, a corporation known as "The Grand," Ferdinand Siegel and Joseph Siegel, and one Maximilian Philipsborn, liable for said debt. The facts alleged as the basis of such liability were, that said Simmons, for an expressed consideration of \$160,000, conveyed the premises to Maximilian Philipsborn, who purchased them for and on behalf of appellants Ferdinand Siegel and Joseph Siegel; that Philipsborn conveyed the premises for the same expressed consideration to said Ferdinand Siegel and Joseph Siegel; that said Philipsborn and Joseph Siegel and Ferdinand Siegel were the owners of all the stock in said corporation, The Grand; that the contract for the purchase of the premises was made by The Grand for the consideration of a stock of goods and fixtures transferred to Simmons and valued at \$125,000; that The Grand demanded payment of Simmons of said \$25,000 to

apply on the indebtedness secured by the trust deed, and Simmons paid the same; that said \$25,000 was paid to said Philipsborn and said Ferdinand Siegel and Joseph Siegel, the stockholders of The Grand, who were the real parties in interest, and that by virtue of said facts the said corporation and parties became personally liable to pay the debt. Philipsborn and the appellants, Ferdinand Siegel, Joseph Siegel and The Grand, answered, denying all liability for the debt.

The cause was referred to a master in chancery to take the evidence and report it, with his conclusions. The master's report showed the amount due on the trust deed and for solicitor's fee, which, with interest to the date of the decree for sale, amounted to \$89,641.64. The property sold for \$50,000, and, with interest from the date of the decree and the costs of suit and sale, there was a deficiency of \$41,357.84, for which there was a personal decree against the Clarks, Annah B. Peck, Thomas B. Bryan and Howard P. Simmons. There is no controversy about those decrees or the sale. The only point contested before the master or the court related to the personal liability of appellants and Philipsborn for any part of the debt secured by the trust deed. The master reported that The Grand was liable for the deficiency because it had the land and \$25,000 paid by Simmons with which to pay the debt. He also reported that the actual consideration passing from Ferdinand Siegel and Joseph Siegel to The Grand for the same money and property conveyed to them was the payment of a merchandise indebtedness of The Grand of \$28,000, and an understanding that they would credit The Grand, on account of its indebtedness to them, with whatever they might realize out of The Cambridge, and therefore their position towards Simmons was the same as that of The Grand, and they were personally liable. His further conclusion was, that even if that were not so, Ferdinand Siegel, Joseph Siegel and Philipsborn, as directors of The Grand,

incurred liabilities in excess of its capital stock and were personally liable under the Corporation act, and, for the purpose of avoiding unnecessary litigation, their liability could properly be enforced in this suit. There was no statutory liability charged against the parties as stockholders of The Grand, and there was no issue of that kind referred to the master.

The circuit court sustained exceptions to the master's report, but found that Ferdinand Siegel, Joseph Siegel, Philipsborn and The Grand received from Simmons \$25,000, to be used, by agreement between the parties, for the express purpose of paying the same on the trust deed, and that said parties were liable for said sum, with interest from January 20, 1897, at six per cent until the maturity of the note secured by the trust deed, and seven per cent thereafter to the day of sale. The court again referred the cause to the master to state the amount for which said parties were liable. The master reported and the court entered a decree against them for \$29,502.78, the interest having been computed as directed. Appellants and Philipsborn removed the record to the Appellate Court by appeal. The Appellate Court held the decree erroneous only as to the time for which interest was computed and in computing it at a higher rate than allowed by law, and appellee having remitted the excess of interest, amounting to \$1978.49, the decree was affirmed for the balance. The case is here by appeal from the judgment of the Appellate Court.

The agreement for the purchase of The Cambridge and the exchange of the properties was in writing, and was made January 20, 1897. It was signed by Howard P. Simmons and by the corporation, The Grand, through its president, under its corporate seal, attested by its secretary. * The deed from Simmons and wife to Maximilian Philipsborn was made in pursuance of the contract and a resolution of the directors of The Grand, as trustee for the corporation, and neither in the contract

nor in the deed, nor in the subsequent deed to the Siegels, was there any assumption whatever of the debt secured by the trust deed or any agreement to pay it or any part of it. The deed was to be made, and was made, subject to the trust deed. The contract and deed not only failed to imply any assumption of the debt, but rather excluded the implication. Complainant can only establish the liability of appellants by proving a contract to assume and pay the debt, or some part of it. To sustain the decree, the facts proved must amount to an agreement to pay the \$25,000 upon the debt secured by the trust deed. It is true that a contract may be implied, and that if the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the encumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price so that the law will imply the promise. (*Comstock v. Hitt*, 37 Ill. 542; *Hammer v. Johnson*, 44 id. 192; *Fowler v. Fay*, 62 id. 375; *Rapp v. Stoner*, 104 id. 618; *Drury v. Holden*, 121 id. 130; *Consolidated Coal Co. v. Peers*, 166 id. 361; *Crawford v. Nimmons*, 180 id. 143.) In this case there was no retention by the grantees of any part of the agreed purchase price for the encumbered property. The transaction consisted of a trade, in which Howard P. Simmons conveyed The Cambridge, subject to the trust deed, and block 44 in Cornell, to Philipsborn, as trustee for The Grand, and paid \$25,000 in cash and notes, and assumed the leases on the premises occupied by The Grand, at the corner of State and Adams streets, in Chicago. The consideration given to Simmons was the stock of merchandise of The Grand and other merchandise, to bring the amount, at invoice prices, up to

\$95,000, and fixtures valued at \$30,000, and the leases on the premises held by the Siegels. The \$25,000 was received as a part of the consideration for the merchandise and fixtures transferred to Simmons and not retained out of the consideration for The Cambridge.

The claim of appellee is, that the Siegels and Philipsborn, who were the only stockholders of The Grand, found that the trust deed for \$75,000 could not be renewed for more than \$50,000 and thereupon demanded that \$25,000 should be paid to them to reduce the encumbrance to \$50,000. It is contended that this placed them upon the same basis as one who retains a part of the purchase price for the purpose of paying it upon an encumbrance. If that is so, any presumption or implication of the law from such fact was met in this case by proof that the parties utterly refused to assume any part of the mortgage, and before the contract was drawn said that under no circumstances would they assume it or any part of it. The implied contract to pay to the holder of an encumbrance money retained for that purpose arises only from the presumed understanding of the parties. It is implied because the facts justify the inference that such was the mutual intention; but an implied contract can not exist when there is an express one about the same subject matter. It is only where the parties do not expressly agree that the law implies a promise. (*Walker v. Brown*, 28 Ill. 378; 15 Am. & Eng. Ency. of Law,—2d ed.—1078.) In this case there was an express agreement and a distinct refusal to pay any money on the debt. The parties concerned in the transaction were Howard P. Simmons, who executed the written contract and made the deed; John C. Stetson, his attorney; George F. Montgomery, who had an interest with Simmons in the transaction, but who, on account of his financial condition, transacted business in the name of his wife and acted as agent in the matter; Joseph Siegel, Ferdinand Siegel, Maximilian Philipsborn, and their attorney, Augustus

Binswanger. With the exception of Montgomery, these parties united in testifying that the Siegels and Philips-born refused to make the trade if the mortgage had to be assumed by them, and that they did not assume it. Montgomery does not contradict any of this testimony, and there is no evidence tending to prove the contrary. The trade was pending for two or three weeks, and the ground for claiming an assumption of the debt to the extent of \$25,000 is, that during that time, before the written contract was made, appellants demanded the \$25,000 to reduce the mortgage debt. It seems the Siegels proposed to see Mr. Blair, the agent for appellee, to see if the mortgage could be renewed when due, and they learned from him that he would not renew it for more than \$50,000. They also sent an architect to examine the property and report upon its value, and from the report of the cost of the building and refusal to renew the mortgage they refused to go on with the trade at the original figures and demanded \$25,000 in money. Simmons proposed to pay part of it in money and give notes for part, and his proposition was accepted.

Appellants objected to the oral evidence of these facts as varying the terms of the written contract, and they also say that the allegations and proofs do not agree, but as we are of the opinion that the evidence does not sustain the decree it will not be necessary to notice those questions.

If all the evidence is considered it will not warrant fastening any liability upon the appellants. It is impracticable to go into the testimony at length. George F. Montgomery testified that when it was found that the mortgage could not be renewed for more than \$50,000, the Siegels refused to close the deal unless Simmons would pay \$25,000 in cash. His evidence is very uncertain and unsatisfactory, and he said that it was difficult for him to remember the details of the affair at all. While he said the Siegels would not trade unless Simmons

would pay off \$25,000 of the mortgage, he also said that they demanded the \$25,000 to pay debts of The Grand. On his attention being called to the two statements he said they were both correct, and further, that the Siegels told him they did not place any value on the equity in The Cambridge,—that they simply wanted to trade it off; that their object in making the trade was to get rid of the leases on the building occupied by The Grand; that they had four or five years to run, at an annual rental of \$40,000, and that they had no use for the property, and the trade was to get Simmons to assume the leases. Thomas B. Bryan testified to admissions of the Siegels long after the transaction, which are emphatically denied by them. Bryan had assumed the debt, and testified that he read to Joseph Siegel part of a letter written by William A. Simmons, (father of Howard P. Simmons,) who was interested in some way in the transaction, to George F. Montgomery, in which Simmons said that Bryan was in a good deal of trepidation about the affair; that he told Bryan whatever was paid in cash was paid to enable the parties to reduce the mortgage on The Cambridge \$25,000; that his remembrance was that they had not assumed the mortgage, but nevertheless the understanding was that the money should be applied in that way. The witness testified that when he read this Joseph Siegel said that was all right. Bryan was interested in obtaining an admission, and was arguing with the Siegels about the law, to convince them of their liability. His testimony is subject to the well known rule that testimony of verbal admissions is to be received with caution. A letter of Mr. Stetson, the attorney, to said W. A. Simmons was in evidence, stating that there was no agreement of the Siegels to pay the mortgage, but they must eventually pay it or lose what they had put into the property. Howard P. Simmons, who made the contract and deed, testified that nothing was said to him and he did not learn anything about the application

of the \$25,000 that he paid, to The Grand, and that when the parties refused to make the trade if the mortgage was to be assumed by them, he said he would forego the assumption of the mortgage in order to carry through the deal. All the other parties to the transaction deny that the money was to be applied on the mortgage. The one who paid the money and those who received it say it was not paid to be applied on the debt, and they are the parties between whom it is sought to raise an implied contract.

After whatever talk there was about the \$25,000 the written contract was made. The substance of it is, that Simmons was to convey his property subject to the trust deed, and pay \$25,000 in cash and notes and assume the leases. He was to receive the merchandise at \$95,000 and allow \$30,000 for the fixtures, making \$125,000. In the lengthy preamble to the contract it is said that the purchase price of the property conveyed by Simmons was fixed at \$200,000, less the amount of the trust deed, of \$75,000. The deed of The Cambridge, when made, recited a consideration of \$160,000, and was made subject to the trust deed, and the deed of block 44 was in consideration of \$15,000. It seems to be claimed that in some way the figures given in the contract prove that the \$25,000 was to be applied on the mortgage. The evidence was that the transaction was simply a trade of properties,—so much goods and fixtures for the equity and block 44 and cash,—and the consideration was a matter of indifference, except so far as it was desirable to state a good consideration for the property which the parties expected to trade with. Howard Simmons testified that the equity in The Cambridge was valued at \$85,000, block 44 at \$15,000, and the \$25,000 cash and notes equaled the stock and fixtures of The Grand,—\$95,000 for the merchandise and \$30,000 for the fixtures. In the contract the Simmons property was priced at \$200,000, and it is said that the merchandise being \$95,000,

the fixtures \$30,000 and the mortgage \$75,000, made up that amount, and that the expressed consideration in the deeds, \$160,000 for The Cambridge and \$15,000 for block 44, amounted to \$175,000, which is \$25,000 less than the price fixed in the contract for the Simmons property. It is true that the considerations in the deeds amount to \$25,000 less than \$200,000, but that fact does not tend to prove the theory of appellee. All that fact tends to prove is, that when Simmons made the deeds he put the considerations less than in the contract by \$25,000 and made up the difference with the cash and notes, and that corresponds with the figures in his testimony. Taking the Simmons property at \$200,000, subject to the mortgage of \$75,000, the equity would be \$125,000, and the merchandise and fixtures amounted to \$125,000. When Simmons paid the \$25,000 it simply increased the amount he was giving from \$125,000 to \$150,000. According to that theory he was giving \$150,000 for goods and fixtures worth \$125,000. The assumption that the \$25,000 was paid to reduce the mortgage to \$50,000 does not complete the equation or add to the probability of appellee's claim. If the Simmons property was worth \$200,000 and the mortgage reduced to \$50,000, the equity would be \$150,000. All that the evidence proves is, that the Siegels concluded not to trade unless they got \$25,000 more than they had proposed to take, and Simmons was willing to pay that much more to get rid of his property. The evidence did not justify the court in finding that there was an agreement to pay the \$25,000 on the mortgage.

The judgment of the Appellate Court and the personal decree of the circuit court against the appellants are reversed and the cause is remanded to the circuit court, with directions to modify its decree accordingly.

Reversed and remanded.

PHILIP D. ARMOUR *et al.*

v.

FELIX BRAZEAU.

Opinion filed June 19, 1901.

1. INSTRUCTIONS—*instruction must be clear and must be applicable to the evidence.* An instruction must be clear and simple, and consist of a plain statement of the law, which may be readily understood by the ordinary men who are called as jurors, and must be applicable to the evidence and the facts in the case.

2. MASTER AND SERVANT—*duty of "inspection" rests upon the master.* The liability of machinery and appliances to get out of order from time to time gives rise to the duty of using reasonable care to keep them in fit condition, which is the duty of "inspection" as meant by the law; and this duty rests upon the master, and not upon the servant.

3. SAME—*though not required to inspect appliances, servant is bound to notice open defects.* Although a servant is not required to make the critical examination of appliances which is meant by the term "inspection," yet if the defect is open and obvious, so that by the exercise of ordinary care in the use of the appliance he would have knowledge of the defect, he is charged with notice thereof, since the servant cannot assume that a defect which is open to observation does not exist.

4. SAME—*elements necessary to authorize a recovery by a servant for injuries from defective appliance.* Before a servant can recover because of alleged negligence of the master in providing a defective plank for a scaffold, he must show that the plank was defective and that the injury was occasioned thereby; that the master had notice of the defect, or might have had by exercise of ordinary care; that the servant did not know of the defect and had not means of knowledge equal to those of the master, and that he was, in relation to the accident, in the exercise of ordinary care at the time he received the injury.

MAGRUDER, J., dissenting.

Armour & Co. v. Brazeau, 93 Ill. App. 235, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

191	117
202	*841
e104a	*599
105a	*601
191	117
208	*257
208	*497
206	*158
107a	*248
107a	*530
191	117
f112a	*192
191	117
215	*488

A. R. URION, and A. B. STRATTON, (A. F. REICHMANN, of counsel,) for appellants:

Where the master does not undertake the duty of furnishing or adopting the appliances by which the work is to be performed, but this duty is entrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they thus undertake. *Kelley v. Norcross*, 121 Mass. 508; *Ross v. Walker*, 139 Pa. St. 42; *Griffiths v. Railroad Co.* 149 N. Y. 595; *Butler v. Townsend*, 126 id. 105; *Fraser v. Lumber Co.* 45 Minn. 235.

If the structure, appliance or instrumentality is one which has been furnished by the master for the work in which the servants are to be engaged, the master must exercise reasonable care in their selection or preparation. *Fraser v. Lumber Co.* 45 Minn. 235.

If the furnishing, selection or preparation of the structure, appliance or instrumentality is itself part of the work which the servants are to perform, the master is not liable for negligence in its selection or preparation or in the selection of materials therefor. *Fraser v. Lumber Co.* 45 Minn. 235.

Whether an employee is a fellow-servant or a vice-principal must be determined by the nature of the duties which he is performing. If he is performing merely the duties of a servant, then, as to the others engaged in the prosecution of the same common object, he is a mere fellow-servant; but if he is performing a duty which the master primarily owes to his servants, then, as respects such duty, he is the representative of the master. *Gall v. Beckstein*, 173 Ill. 187; *Fraser v. Lumber Co.* 45 Minn. 235; *Peffer v. Cutler*, 83 Wis. 281; *Noyes v. Wood*, 102 Cal. 389.

If the negligence complained of consists of an act or omission by the superior servant which relates, not to his supervisory duties, but to his duties as a co-laborer

with those under his control, the master is not liable. *Railroad Co. v. May*, 108 Ill. 288.

A servant, in order to recover for defects in the appliances of the business furnished him, is called upon to establish three propositions: First, that the appliance was defective; second, that the master had notice thereof or knowledge, or ought to have had; and third, that the servant did not know of the defects and had not equal means of knowing with the master. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Wood on Master and Servant*, sec. 414; *Goldie v. Werner*, 151 Ill. 551; *Howe v. Medaris*, 183 id. 288; *Hines Lumber Co. v. Ligas*, 172 id. 320; *Railroad Co. v. Wilson*, 189 id. 98; *Kammer v. Weber*, 151 N. Y. 418.

KING & GROSS, for appellee:

While the servant assumes the ordinary risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. 14 Am. & Eng. Ency. of Law, 854, and cases cited.

The servant has the right to assume that the material and employment furnished him by his master are safe and suitable for the business engaged in. 14 Am. & Eng. Ency. of Law, 855, and cases cited.

It is the duty of the master to use ordinary care to examine and inspect the appliances and implements furnished by him to his servants, and it is the duty of the servants to use ordinary care and diligence to observe. This doctrine does not conflict with the doctrine that no sane man is expected to act upon an assumption which he knows to be false. It is a man's duty to exercise common sense when in the employment of the master as well as at any other time. The master has a right to rely upon the servant doing this. *Jennings v. Tacoma R. & M. Co.* 7 Wash. 275.

The employee is not under like obligation as the master to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty and complied with the requirements of the law, and it is only when he has knowledge of the defects in the machinery which he is required to use, and continues to use without objection, that he is presumed to waive the defect. It is not true that the plaintiff's right of recovery is defeated by the use of machinery without objection when he has simply the means of knowledge of defects therein the same as his employer. *Muldowney v. Railroad Co.* 36 Iowa, 462.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee worked, with others, for appellants as a whitewasher in one of their buildings. He and the others who worked with him made a scaffold to stand on, by putting two planks, two inches thick, twelve inches wide and sixteen feet long, on beams in the building, the ends resting on the beams. Across these two planks they put three short pieces. While appellee and two others were standing on the scaffold, whitewashing, one of the planks broke, and appellee fell upon a dynamo and his leg was broken. He brought this suit to recover damages for the injury.

The declaration consists of three counts. In the first, the alleged liability of defendants for the injury is based upon the charge that they, by their servants and agents, carelessly and negligently ordered the plaintiff and others to construct a scaffold of boards which were not reasonably safe for the purpose for which the same were used, in that they were weak and defective. The charge in the second count is, that the defendants, by their servants who were not fellow-servants of the plaintiff, negligently and carelessly constructed the scaffold with boards which were thin and weak, so that the said scaffold was not

safe for the plaintiff and others to work upon, and that the plaintiff and others proceeded upon said scaffold under orders from the defendants, by their agents and servants in that behalf whom the plaintiff was bound to obey. The wrong alleged in the third count was, that the defendants, by their servants and agents who were not fellow-servants with the plaintiff, furnished for said scaffold a certain plank which was defective, in that it had a certain knot therein, which rendered it weak and not reasonably safe for the purpose for which it was used, of which fact defendants had notice but plaintiff had not. The plea is the general issue. There was a trial, which resulted in a verdict against defendants for \$2000, on which judgment was entered, and the Appellate Court affirmed the judgment.

The evidence tended to prove the following facts: Plaintiff had worked for defendants about three months. Defendants were putting up a building, and for the first six or seven weeks plaintiff handled lumber, assisting in hoisting it and moving it on trucks around the building where it was wanted. After the men got through with that work he was set to whitewashing, and had been at that work about a month and a half. He and his fellow-workmen whitewashed the new building outside and in, and in doing that work they took two-inch planks that were around the premises and made scaffolds by putting the planks on horses. When the planks were first taken for that use by the plaintiff and his fellow-workmen they were clean, but afterwards got more or less whitewash on them. After that job was done, Mr. Brown, the master mechanic who had general charge of the men, set plaintiff and the others to whitewash in the Brown engine room, in another building. Plaintiff and his associates put up three-inch planks for a scaffold in one of the rooms and worked there a short time, when they went into another room. Plaintiff and the other men talked it over that the three-inch planks which they had used

in the first room were too heavy to handle among the pulleys and electric wires, and therefore they concluded to get two-inch planks. Gallagher, who worked with the others at the whitewashing, was a painter as well as whitewasher, and understood more about the business than the others. He mixed the whitewash and gave the men general directions in the work. The proposal to get two-inch planks did not originate with Gallagher, but the three-inch planks were rejected because they were not easy to handle, and this was done at the instance of plaintiff, with the other workmen. Gallagher assented to the proposal, and the men all went together to look for two-inch planks. They went to the carpenter shop and found a pile of planks, consisting of three-inch planks on top and some two-inch planks at the bottom. Himmelwright, the boss carpenter, told the men that it would be better to go over to the felt works and get some planks over there, and that it would save time, rather than upset the pile at the carpenter shop. The felt works was the new building, about a block away, where they had done the whitewashing before. When the men got to the felt works they found ten or fifteen of the two-inch planks, with more or less whitewash on them, which they had used before, lying around on the floor and some of them covering a shaft-hole designed for an elevator. One of these planks was taken from the floor by two of the other men, who tested it by one getting upon it and springing it, and they carried that plank to the engine house. Plaintiff and one of the other men took one of the planks that was over the shaft-hole. There was a dispute in the evidence as to who picked up that plank. Plaintiff testified he stooped down to pick up a plank, and Gallagher had a plank in his hand and handed it over to him and said to take that plank over, and he took hold of the rear end of the plank and Henry DeMars carried the front end, and he did not examine the plank at all. One of plaintiff's witnesses testified that Gallagher told

them to take those planks that were there, but did not say any certain board; that Gallagher picked up one end of the plank and gave it to plaintiff, but did not tell any one to take that plank. Gallagher and DeMars were called by the defendants, and Gallagher testified that he did not handle the plank or say anything to plaintiff about it, but only told plaintiff, when he lifted it up, to push the others over so as not to leave the open space in the elevator shaft. DeMars, who carried the other end of the plank, testified that he and plaintiff picked up the plank and no one told them to take it. After the plaintiff and his associates reached the engine room they put up the planks on the beams. It was a part of their work to erect their own scaffold, and no one else had anything to do with it, but plaintiff testified that after they got them fixed Gallagher said the boards were all right—to go to work. The plank that broke had a knot on one side of it running diagonally the greater part of the width of the plank. There is no evidence as to which one of the planks broke, unless there is an inference from the test made of one of them by one man getting upon it, and there were three men on the scaffold, with heavy pails of whitewash, at the time of the accident.

The court gave to the jury the following instruction at the instance of the plaintiff:

“The jury is instructed that the servant is not bound to inspect the appliances furnished him by his master for the performance of his duties. The servant has the right to assume that the master has used ordinary care and diligence to furnish him, the servant, with appliances reasonably safe for the performance of his duties. The servant is bound to take notice of such defects as would be disclosed by ordinary care and diligence in observing the appliances furnished him; and if the jury find, from a preponderance of the evidence in this case, that there was a defect in the plank in question in this case, and that such defect was the cause of the accident to the

plaintiff in this case, and that the plaintiff did not know of such defect, and that he, the plaintiff, in the exercise of ordinary care and diligence would not have discovered the same, then, if you further find that such defect was one which would have been discovered by the defendants in time to have prevented the accident in question by the exercise of ordinary care and diligence in examination and inspection, then the jury should find the defendants guilty, provided the jury believe, from the evidence, that the plank had been provided by the defendants for use generally, in such use as it was being put to at the time of the accident, and if the plaintiff was in the exercise of ordinary care in all his conduct connected with or preceding the accident."

It is one of the requirements of the law that an instruction shall be clear and simple, and consist of a plain statement of the law which may be readily understood by the ordinary men who are called as jurors. There may be a difference between inspecting a plank and observing it and exercising care to discover a defect in it, but to the mind of the average juror there would be but little difference between them, and the instruction undertakes to state the duty of plaintiff in these several particulars. It starts out with the proposition that a servant is not bound to inspect the appliances furnished him, but may assume that they are reasonably safe for the performance of his duties. According to that part of the instruction plaintiff had nothing to do, but was expressly exempt from paying any attention to the plank to ascertain whether it was fit for use, but might rightfully assume that it was fit. The next proposition is, that a servant is bound to take notice of such defects as would be disclosed by ordinary care and diligence in observing the appliances furnished him. Applying the rule to this case, plaintiff was bound to take notice of the knot if it was of a character to be disclosed by ordinary care and diligence in observing the plank. Then follows an hypothesis of

fact upon which the jury are ordered to find the defendants guilty, and it embraces as one of the facts that the plaintiff, in the exercise of ordinary care and diligence, would not have discovered the defect, which consisted of the knot. Such an instruction furnished no clear and simple guide to enable ordinary men to apply the law in determining the rights of parties. The jury might follow the first part of the instruction, which told them that plaintiff might assume that the plank was all right and was not bound to inspect it, or the other proposition, that required of him ordinary care and diligence in observing it and discovering defects in it. They could not follow both, and the only tendency of the instruction would be to confuse them on the subject. Another requirement is, that an instruction shall be applicable to the evidence and the facts in the case, and the instruction violates that rule. It is the duty of an employer to use ordinary care and diligence to provide the employee with reasonably safe appliances with which to work. This obligation of the employer is a personal one, and if he delegates its performance to another, he is responsible for the manner in which it is performed. This duty includes ordinary care in the examination of appliances furnished to workmen. If there was any breach of that duty in this case, it was in furnishing the plank which had a knot in it, and not in a failure to make subsequent inspection, by which a changed or weakened condition would have been made manifest. There is a duty of the employer arising out of the liability of machinery or appliances to get out of order from time to time or to become unfit for use from wear or from age and decay, and this is the duty of inspection as meant by the law. While there is no absolute duty to keep appliances in safe condition, there is a duty to use reasonable care to keep them fit, and this duty may require inspection at reasonable intervals and the employment of such tests as will reveal the condition of the machinery or appliances. This duty of inspection

rests upon the employer and not upon the employee, and depends upon the character of the machine or appliance, since ordinary care may require an inspection oftener in one case than in another. The rule as to such inspection is correctly stated in the instruction, but it is not applicable to the facts of the case, and to give it was prejudicial to the defendants.

The court refused to give the following instruction asked by the defendants:

"The jury are further instructed that the burden of proof in this case is upon the plaintiff, and before he can recover on account of the alleged negligence on the part of the defendants in providing or having for use a weak, defective or insufficient plank as a scaffold, it is necessary for the plaintiff to prove, by a preponderance of the evidence, (1) that the plank was insufficient, weak or defective, and that the accident happened as the result of such weakness, insufficiency or defect; (2) that the defendants had notice or knowledge of such insufficiency, weakness or defect, or that they might have had notice thereof by the exercise of ordinary care; (3) that plaintiff did not know of such insufficiency, weakness or defect, and that he had no means of knowledge thereof equal to those of the defendants; and (4) that he was, in his relation to the accident, in the exercise of ordinary case. If the plaintiff fails to prove, by a preponderance of the evidence, any one of these four propositions, the jury should find for the defendants, even though they find that Gallagher was foreman and gave directions to use plank in question."

The main principles stated in this instruction were declared to be the law in *Goldie v. Werner*, 151 Ill. 551, where they were quoted from section 414 of Wood on the Law of Master and Servant, and they have been adhered to and repeated in substantially the same language in *Hines Lumber Co. v. Ligas*, 172 Ill. 315, *Howe v. Medaris*, 183 id. 288, and *Lake Erie and Western Railroad Co. v. Wilson*, 189 id. 89.

If a defect in an appliance is open and obvious, so that by the exercise of ordinary care in the use of the appliance the employee will have knowledge of the defect, he is bound to take notice of the defect. He cannot assume a fact against his own knowledge, and assume that a defect open to his observation does not exist. The claim that we have departed from the rules stated in the instruction is unwarranted, and we do not understand how the rule that a servant must not only know of a defect but also know that the defect renders the appliance unsafe, tends to support such a claim. It is true, that in order to charge an employee with negligence he must know of the defect, and must know that it is such as will interfere with the use of the appliance so as to make it dangerous to use it; but if plaintiff knew that there was a knot running across this plank he necessarily knew that it weakened it and rendered it unsafe. It is also true, as already stated, that a workman is not bound to make the critical examination which is meant by the term "inspection," to ascertain whether a machine or appliance is in good repair, nor to make such inspection of premises to ascertain whether they remain in good condition. Where such questions have arisen the rules applicable to them have been stated, but as applied to the facts of this case there has been no departure from the rules stated in the instruction, and it should have been given.

The judgments of the Appellate Court and the superior court of Cook county are reversed and the cause is remanded to the superior court.

Reversed and remanded.

Mr. JUSTICE MAGRUDER, dissenting: I think the judgments of the lower courts are correct, and should be allowed to stand for the reasons given in the opinion of the Appellate Court delivered upon the decision of this case and reported as *Armour v. Brazeau*, 93 Ill. App. 235.

THE FIRST NATIONAL BANK OF PEORIA *et al.*

v.

THE PEORIA WATCH COMPANY *et al.**Opinion filed June 19, 1901.*

1. CORPORATIONS—*when stockholder is not liable to creditor on stock subscription.* If a person subscribes for a certain amount of stock, which he does not pay for but surrenders to the corporation, which sells the stock to other parties who pay for the same in full, there is no liability on the part of the original subscriber to creditors under section 8 of the Corporation act, concerning the liability of stockholders for amounts unpaid upon their subscriptions.

2. SAME—*surrender of stock to a corporation is, in effect, a purchase.* A corporation may, if it acts in good faith, buy and sell shares of its own stock, and the surrender of stock to the corporation by a stockholder is, in effect, a purchase by it.

3. RES JUDICATA—*suits must be between same parties if former judgment is not in rem.* A decree in a suit by a bank, which finds the defendants to be stockholders in a corporation and orders them to pay a judgment held by the bank, is not *res judicata* as to the liability of defendants, as stockholders, in a subsequent suit against them by a different bank.

First Nat. Bank v. Peoria Watch Co. 93 Ill. App. 502, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding.

ARTHUR KEITHLEY, for appellants:

A stock subscription is a trust fund. *Clapp v. Peterson*, 104 Ill. 31; *Mining Co. v. Mining Co.* 116 id. 174.

A stockholder is bound by a subscription notwithstanding a release by the company and new subscription procured in lieu thereof. *Cartwright v. Dickinson*, 88 Tenn. 476; *Alling v. Wenzel*, 133 Ill. 265.

The purchase of its own stock by a corporation cancels such stock. *Belnap v. Adams*, 22 So. Rep. 382; *Mora-wetz on Corp. secs. 112-114.*

A subsequent creditor can avail himself of a wrongful release of the stockholders. Cook on Stockholders, sec. 170, notes; Morawetz on Corp. sec. 827; *Griswold v. Seligman*, 72 Mo. 110.

The decree in the *German Bank case*, finding Cole and Gish stockholders and liable, is binding and conclusive in this case. Black on Judgments, secs. 603-605; *Kolb v. Swann*, 68 Md. 516; Thompson on Corp. sec. 8665; Cook on Stockholders, sec. 268; *Mining Co. v. Mining Co.* 157 U. S. 691.

There can be no novation or substitution of one subscriber for another as against a creditor who has the right to determine for himself whom he will accept as his debtor. Morawetz on Corp. sec. 808; *Barker v. Keown*, 67 Ill. App. 433.

JACK & TICHENOR, for appellees:

Under our statute a subscriber may have his stock forfeited for non-payment of calls. If the corporation acts in good faith no one can question the validity of the forfeiture except the subscriber. After forfeiture the subscriber ceases to be a member of the corporation, and is no longer liable for assessments or for corporate indebtedness. Thompson on Corp. secs. 1792, 1794, 1803; Cook on Stockholders, secs. 127, 177; *Mills v. Stewart*, 66 Barb. 444; 41 N. Y. 384; *Allen v. Railroad Co.* 11 Ala. 450; *Mandel v. Swan Land Co.* 154 Ill. 177.

A corporation may acquire the title to its own stock, either by forfeiture or by compromise with the original subscriber, or, in our own State, by direct purchase. It may then re-issue the stock to any third party, provided the transaction is in good faith and no injury is done to existing creditors. Cook on Stockholders, sec. 177; *Perkins v. Union Button-hole Co.* 11 Allen, 273; *Alling v. Wenzel*, 133 Ill. 264; *Mining Co. v. Mining Co.* 116 id. 170; *Insurance Co. v. Swigert*, 135 id. 150.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellants, the First National Bank of Peoria and Charles R. Wheeler, a stockholder of the Peoria Watch Company, by their amended bill filed in this case in the circuit court of Peoria county alleged that said company was organized as a corporation in the year 1885, with a capital stock of \$250,000; that the appellee Johnson L. Cole subscribed for two hundred shares of stock of the par value of \$20,000; that the appellees Moses N. Gish and Joseph N. Brodman became subscribers for stock to the amount of \$500 each; that the corporation became indebted to the complainant the First National Bank, and afterward ceased doing business, abandoned its corporate existence, disbanded and disorganized; that said Cole, Gish and Brodman never paid their subscriptions, or any part thereof, and that all other subscriptions were paid except that of one Truesdale and those of certain others who had become insolvent. The corporation and its stockholders were made defendants, and the prayer of the bill was that the delinquent stockholders be decreed to pay the entire amount of their subscriptions, and that a receiver should be appointed and the corporation wound up. The defendants were all defaulted except Cole, Gish and Brodman, each of whom answered. Cole admitted that he made the subscription of \$20,000, and alleged that he was released from his subscription, which was assumed by the corporation; that he assigned his subscription to the corporation and it sold the entire amount of the stock for which he had subscribed to other parties, and received payment therefor in full and issued certificates of the stock to such purchasers. Gish answered that he never subscribed for five shares of stock but did subscribe for two and a half shares, at the par value of \$250; that he disputed the claim that he subscribed for five shares, and that the controversy was settled by the corporation taking payment for two and a half shares of stock and

he surrendered the balance of the alleged subscription. Brodman answered that he subscribed for five shares and paid the first assessment of ten per cent; that he claimed a defense against the subscription, and that the corporation forfeited the stock, retaining what he had paid, and re-issued the stock to persons who paid in cash the full par value of the same. Replications were filed and the cause was referred to a master, who reported in favor of the defendants and recommended a dismissal of the bill. The court overruled the exceptions of the complainants to the master's report and entered a decree dismissing the bill, which has been affirmed by the Appellate Court.

Complainants proved that the corporation was indebted to the First National Bank in the amount of its promissory note dated March 18, 1891, for \$10,607.41, drawing eight per cent interest. Most of the facts were then agreed upon by written stipulation, with some oral evidence, and the facts so agreed upon and proved are as follows: The defendant Peoria Watch Company was organized as a corporation in the year 1885 with an authorized capital of \$250,000, which was never increased. The defendant Johnson L. Cole was one of the original subscribers to the amount of \$20,000. The defendants Moses N. Gish and Joseph N. Brodman each subscribed for stock to the amount of \$500. Cole paid nothing on his subscription, and soon after the organization the directors passed a resolution assuming the stock subscribed for by him and providing for obtaining new subscribers for the same and issuing said stock to new purchasers as it should be paid for in full. The directors then took subscriptions for said stock subscribed for by Cole to the amount of between \$6000 and \$7000, which was fully paid for and certificates of the stock were issued to the subscribers. The defendant Moses N. Gish settled with the corporation for one-half of his original subscription, and he took two and a half shares, which were paid for and the company released the balance. The defendant Joseph

N. Brodman paid only ten per cent of his subscription. About March 1, 1889, the directors issued a statement to the stockholders that the amount of stock paid up and issued was approximately \$210,000; that there remained about \$40,000 of stock which had been forfeited by the subscribers and never paid up or issued; that the subscribers therefor were insolvent, and the management had decided to ask the existing stockholders to take said unissued stock in proportion to stock which they held and to pay the par value thereof to the company. The stockholders accepted the proposition and subscribed for and paid into the treasury the par value of all said stock, and at least \$40,000 so subscribed was paid into the treasury. The several balances of the subscriptions of Cole, Gish and Brodman, together with those of other stockholders then in default, were embraced in the amount of subscriptions stated and referred to in the circular as in default, and the shares subscribed for by them were taken and paid for by the other stockholders. All the unissued capital stock was issued up to the limit of the total authorized capital and was paid for at par, so that the entire capital stock of \$250,000 was subscribed and paid for in full. Stock of the defaulting subscribers which was so taken was made preferred stock to the extent of eight per cent annual dividends thereon as a first charge on the net profits of the company.

It is first insisted that the decree was erroneous because Cole, Gish and Brodman are bound in the law by their subscription, and may be compelled to pay the same notwithstanding the release by the corporation, the new subscriptions in lieu thereof and the payment in full for the stock. The supposed liability is created by section 8 of the act concerning corporations for pecuniary profit, under which the Peoria Watch Company was organized. That section provides that stockholders shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held

by them; that no assignor of stock shall be released from any such indebtedness by reason of any assignment of stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid, and that every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, to the extent and in the same manner as if he had been the original subscriber. The statute makes the individual liability to pay for capital stock a security for the payment of debts, and the law will not tolerate any scheme by which such security is diminished or impaired to the prejudice of creditors. The obligation created is that the stock shall be paid for, and it rests upon the original subscriber and every subsequent assignee until payment is made. We are asked to construe the statute to mean, that when a subscriber has assigned his stock and it has been paid for in full he still remains liable on his original subscription, or, in other words, that the creditor can take payment for the stock as many times as there are persons who have subscribed for such stock or held it as assignee or transferee. There is nothing in the statute which would justify such an interpretation, and it is clear the legislature had no such intention. If all the stock subscribed is paid for in full, there is no prejudice to any creditor and the object of the statute is accomplished. The subscriber remains liable jointly with the assignee until the subscription is fully paid, but no portion remains unpaid when either party has paid for the stock in full. When stock has been paid for by any person the obligation of the subscriber is fulfilled, and neither the corporation nor any creditor can charge him with an amount remaining unpaid, for the simple reason that there is nothing unpaid.

It is insisted that the decision in *Alling v. Wenzel*, 133 Ill. 264, in some way sustains the doctrine claimed. We do not see any resemblance between that case and this. There stock was transferred to the corporation and called

treasury stock, and was sold back to its subscribers at prices below its par value. It was held that the scheme was a mere device to evade the law, and that the parties could not defeat their liability to creditors by subscribing for stock and then surrendering it to the corporation and taking it back from such corporation, which they managed, at one-tenth or one-twentieth its value. The amount paid was treated in equity as a payment on the stock which was never paid for in full. By the same rule there would be no remaining liability in this case because the stock was fully paid.

Another case much relied upon is *Cartwright v. Dickinson*, 88 Tenn. 476, in which a subscriber sought to recover what he had paid upon stock which he had brought to the secretary of the association and had canceled. The secretary had no right to release shareholders from their obligations, but had substituted other subscriptions which he had received from third parties for the surrendered stock. The new subscribers did not undertake to take surrendered stock but to pay additional cash to the corporation. The scheme was a fraudulent attempt to relieve the subscriber from his subscription, and the court held that, as a matter of fact, it was not a substitution of the capital of one for that which another was bound to contribute.

In this case, Cole, Gish and Brodman subscribed for certain stock, which was surrendered to the company, and afterward other persons took that stock and paid for it and the legal title passed to them. Counsel does not deny that a corporation may, if it acts in good faith, buy and sell shares of its own stock, and the surrender of the subscriptions was in effect a purchase. (*Republic Life Ins. Co. v. Swigert*, 185 Ill. 150.) What was done in this case was in entire good faith, and no creditor was in any manner injured. We find no authority sustaining the novel proposition advanced, or which holds that a share of the par value of \$100 is not paid for unless every person

through whose hands it has passed has paid \$100, and the statute will not bear that construction.

The next proposition contended for is, that the liability of the defendants Cole and Gish to the First National Bank was *res judicata*, and the decree was erroneous in not finding that their subscriptions had not been paid because of a former adjudication. It was stipulated that the German-American National Bank of Peoria recovered a judgment May 6, 1891, against the Peoria Watch Company; that executions were issued and returned unsatisfied; that said bank filed a bill against the corporation and Cole and Gish to collect the balance of its judgment, and that a decree was entered finding said parties to be stockholders and ordering them to pay said judgment. The record brought here is not sufficient to show identity of causes of action, but, waiving that question, it shows that there was no identity of parties. The decree set forth is not in the nature of a judgment *in rem*, and to sustain the allegation of former adjudication it must be shown that the two actions are between the same parties or their privies. Cole and Gish were not barred from making their defense on account of a former suit between them and another party.

There is no fraud in this case. Every dollar of the capital was paid, and there was nothing in the nature of a representation that the corporation had a capital which it did not actually have. It can make no difference to a creditor if some part of the stock was issued as preferred stock, so long as the money went into the treasury and the dividends on such preferred stock were not paid or to be paid except out of net profits.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

H. CLAY MERRITT

v.

A. W. BOYDEN & SON.

Opinion filed June 19, 1901.

191	186
99a	*879
99a	*880

191	186
102a	*592

191	186
206	*222
e206	*850
106a	*286

191	186
115a	*506
115a	*507

1. **BILLS AND NOTES**—*when alteration of note amounts to a forgery.* If a note for one hundred dollars is altered, without the maker's knowledge, by the erasure of the word "one" and the substitution of the word "thirteen" before the word "hundred" in the body of the note, the alteration amounts to a forgery and the maker is not liable upon the note, even as against *bona fide* purchasers thereof without notice of the change.

2. **SAME**—*the subsequent alteration of a complete note discharges maker from liability.* If a note is complete at the time it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the same by the use of chemicals or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note.

3. **SAME**—*when maker is liable upon raised note.* If the maker of a note has by careless execution of the same left room for an alteration to be made by insertion without defacing the instrument or exciting the suspicion of a careful man, and the note, by reason of the opportunity afforded, is filled up with a larger amount than it bore when signed, the maker is liable thereon, as altered, to any *bona fide* holder without notice.

4. **SAME**—*note for "hundred dollars" is not necessarily a note for "one hundred dollars."* A note for "..... hundred dollars," is not necessarily a note for "one hundred dollars" but is an incomplete note, and if the maker delivers it to a third person to be negotiated, the maker so far makes such person his agent as to be bound by his act in filling out the note, as against an innocent purchaser. (*Yocum v. Smith*, 63 Ill. 321, distinguished.)

5. **SAME**—*mere negligence does not deprive purchaser of character of a bona fide holder.* Mere negligence, however gross, is not sufficient to deprive the purchaser of a note of the character of a *bona fide* holder, but there must be proof of bad faith in order to affect him with notice or knowledge of defects in the note.

6. **SAME**—*effect of alteration of marginal figures of note.* The marginal figures placed above and outside the body of a note are not a part of the note itself, in the sense that their unauthorized alteration will necessarily deprive the purchaser of a note of the character of a *bona fide* holder as against the maker.

7. **APPEALS AND ERRORS**—*when Supreme Court cannot determine whether trial court erred in admitting note in evidence.* Whether the

trial court erred in admitting a note in evidence without requiring explanatory proof of alleged apparent alterations cannot be determined by the Supreme Court where the original note is not preserved for its inspection.

8. TRIAL—*instructions leaving questions of implied knowledge and authority to jury are erroneous.* Implied knowledge and implied authority are questions of law, and hence instructions which leave such questions for the determination of the jury are erroneous.

Merritt v. Boyden & Son, 93 Ill. App. 613, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Henry county; the Hon. W. H. GEST, Judge, presiding.

This is an action of assumpsit, brought by the appellees against the appellant, Merritt, and one L. Silverman on a note made by Silverman and Merritt, which note was payable to their own order and endorsed by them in blank. The declaration contains a special count on the note, and the common counts. The following is a copy of the instrument sued upon: |

"\$1300.00

KEWANEE, ILL., Oct. 4, 1897.

"One year after date I promise to pay to the order of ourselves thirteen hundred dollars at Kewanee, Ill. Value received, with interest at the rate of seven per cent per annum.

Endorsed:

L. SILVERMAN.

L. SILVERMAN,

H. CLAY MERRITT."

H. CLAY MERRITT.

Default was entered against Silverman. Merritt pleaded the general issue, and denial of the execution of the note sued on, sworn to by him. The jury rendered a verdict in favor of the plaintiffs for the sum of \$1519.92, upon which judgment was entered on March 27, 1900. An appeal from this judgment was taken to the Appellate Court, and it has there been affirmed. The present appeal is from such judgment of affirmance.

The defense, set up by the appellant upon the trial below, was that the note in question was signed by him

for the accommodation of Silverman, and as surety for Silverman; that the note, as originally signed, was a note for \$100.00, but that it was afterwards fraudulently changed by altering the figures "100.00" in the upper left hand corner of the note to "1300.00," and by either erasing the word "one" in the body of the note and inserting in its place the word "thirteen," or by writing the word "thirteen" in the body of the note in a blank space left before the word "hundred," so as to make the note appear to be a note for \$1300.00, instead of \$100.00; that the note was without consideration, and that the appellant, Merritt, received none of the proceeds of the sale of the note.

N. F. ANDERSON, E. C. GRAVES, and WILSON & MOORE, for appellant:

The change of the marginal figures, together with the appearance of the words "thirteen" and "hundred," was apparent on the face of the note, and therefore the note ought not to have been introduced in evidence until an explanation of the changes had been shown by the plaintiffs. 3 Randolph on Com. Paper, (2d ed.) sec. 1785; *Walters v. Short*, 5 Gilm. 257; *Montag v. Linn*, 23 Ill. 503; *Hodge v. Gilman*, 20 id. 437.

On the question of notice, everything that appears within the four corners of the paper must be considered. *Prins v. Lumber Co.* 20 Ill. App. 236.

On the issue raised by the plea of non-assumpsit, sworn to, plaintiff must not only prove the signature of the maker, but also prove the allegation of the declaration that the promise was made as alleged. *Walters v. Short*, 5 Gilm. 257; *Yost v. Harvester Works*, 41 Ill. App. 556.

The marginal figures are a material part of the note. *Corgan v. Frew*, 39 Ill. 31; *Hall v. Bank*, 5 Dana, 258.

To alter, without the authority of the maker, the marginal figures avoids the note, even in the hands of a *bona fide* purchaser for value, and no recovery can be had by such purchaser.

If a note is complete, without blanks, at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration and operate to discharge the maker. *Angle v. Insurance Co.* 92 U. S. 331; *Bank v. Stowell*, 123 Mass. 196; 1 and 3 Randolph on Com. Paper, secs. 187, 1754, 1770; *Bank v. Clark*, 51 Iowa, 264; *Fordyce v. Kosminski*, 49 Ark. 40; *Bank v. Bank*, 22 L. R. A. 686; *Holmes v. Trumper*, 22 Mich. 427; *Burrows v. Klunk*, 70 Md. 451; *Bank v. Williams*, 174 Pa. 66.

There is no confidential relation established between the maker of a note and the purchaser of the same that would bind the maker by some unauthorized alteration. *Bank v. Stowell*, 123 Mass. 196.

A material alteration of a note by one of the joint makers thereof before its delivery, without the knowledge of the other maker, makes the note void against the other promisor, although the alteration was made without the knowledge of the payee and without fraudulent intent. The rule is the same if made by a stranger. *Draper v. Wood*, 112 Mass. 315; *Fay v. Smith*, 1 Allen, 417; *Aldrich v. Smith*, 37 Mich. 470; *Hamilton v. Hooper*, 46 Iowa, 515; 2 Am. & Eng. Ency. of Law, (2d ed.) 196.

BLISH & LAWSON, (A. P. MILLER, of counsel,) for appellees:

The question whether there is an alteration of an instrument offered in evidence, apparent on its face, is primarily for the court. If the alteration is not apparent the instrument is entitled to go to the jury on proof of its execution, and the burden of proof to show the claimed alteration is upon the party alleging it. 2 Daniel on Neg. Inst. sec. 1421; Byles on Bills, 492; *Harris v. Bank*, 22 Fla. 501; *Meikel v. Savings Institution*, 36 Ind. 355; *Wilson v. Hayes*, 40 Minn. 531; 1 Greenleaf on Evidence, sec. 564, notes; *Wilde v. Armsby*, 6 Cush. 314.

Marginal figures are no part of a note, and alteration of them is an immaterial alteration and will not avoid the note in the hands of a *bona fide* holder without notice of such alteration, even if fraudulent. 2 Daniel on Neg. Inst. secs. 86, 1499; *Smith v. Smith*, 1 R. I. 398; *Commonwealth v. Bank*, 98 Mass. 12.

Notice to charge a *bona fide* holder of negotiable paper taken in the ordinary course of business before maturity, must be actual knowledge of infirmity sufficient to make his conduct in taking the note an act of bad faith. *Goodman v. Simmons*, 20 How. 343.

The rights of a *bona fide* holder of negotiable paper are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his proper diligence or negligence. *Comstock v. Hannah*, 76 Ill. 530.

When the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice, when the opportunity which he has afforded has been embraced and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. 2 Daniel on Neg. Inst. sec. 1405.

This liability is placed by some of the decided cases on the ground of implied authority. *Bank v. Sargent*, 85 Me. 349; *Spitler v. James*, 32 Ind. 202; *Davis v. Lee*, 26 Miss. 505; *Gillespie v. Kelley*, 41 Ind. 158; *Redlich v. Doll*, 54 N.Y. 234; *VanDuzer v. Howe*, 21 id. 531; *Fullerton v. Sturgis*, 4 Ohio St. 529; *Kitchen v. Place*, 41 Barb. 465; *McGrath v. Clark*, 56 N.Y. 36; *Cason v. Bank*, 97 Ky. 487; *Fahdman v. Taylor*, 75 Ill. 629; *Elliott v. Livings*, 54 id. 213; *Harvester Co. v. McLean*, 57 Wis. 258; *Canon v. Grigsby*, 116 Ill. 157; *Bank v. Neal*, 22 How. 107.

By other courts the liability of the maker of negotiable paper with blanks improperly filled is placed on the ground of negligence. The leading case is *Young v. Grote*,

4 Bing. 253, followed by *Yocum v. Smith*, 63 Ill. 321, *Harvey v. Smith*, 55 id. 224, and *Anderson v. Warner*, 71 id. 20.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

When the note, sued upon in this case, was signed and endorsed by the appellant, Merritt, and L. Silverman, Silverman took the note, and, through his action or that of others acting for him, the note was sold and delivered to the appellees, Boyden & Son. The proof tends to show—and such proof is substantially undisputed—that the appellees purchased the note in good faith without notice of any defect in it, and paid therefor the sum of \$1300.00.

The defense, made by the appellant in the trial court, was based upon two theories: First, that the words, "one hundred" were written in the body of the note before the word "dollars," and that the word, "one," was in some way erased, or taken out of the note, and the word, "thirteen," was written in its place before the word "hundred;" second, that, when the note was signed and endorsed by the appellant, the word, "one," was not in the body of the note, but that there was a blank space before the word, "hundred," and that, in this blank space and before the word "hundred," the word, "thirteen," was written. Whether the note was altered in the one or the other of the modes thus stated, the proof tends to show, and is substantially undisputed, that the change was not made by the appellant, Merritt, or by any one authorized by him to make it, and that he knew nothing about the change, and had no intimation of it, until about the time the note fell due.

First—If the note was altered by the erasure of the word "one" in the body of it and the insertion of the word "thirteen" in the place of the word "one" before the word "hundred," then the alteration amounted to a forgery, and appellant is not liable upon the note, even though

the appellees were *bona fide* purchasers thereof for value without notice or knowledge of the change. If the amount named in a note is raised by erasing what is written, such alteration is a material one, and the note is thereby vitiated, so as to become void. When a note is changed materially either by a payee or transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but no recovery can be had upon it against the maker by a person into whose hands it has come after the change was made, even though the latter be a *bona fide* endorsee for value without notice of the alteration. (2 Am. & Eng. Ency. of Law,—2d ed.—pp. 193, 255, 257; 3 Randolph on Commercial Paper,—2d ed.—sec. 1754). Where a note is complete at the time when it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the same by the use of any chemical process, or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note. (*Burrows v. Klunk*, 70 Md. 460). "When a negotiable instrument is materially altered, no recovery can be had thereon against any one, who became a party thereto prior to the alteration, by any person into whose hands it has come since the alteration, even though he be a *bona fide* holder without notice." (4 Am. & Eng. Ency. of Law,—2d ed.—p. 332; *Angle v. Northwestern Mutual Life Ins. Co.* 92 U. S. 340). In *Burwell v. Orr*, 84 Ill. 465, we said: "The alteration of the instrument, on which the suit was brought, was material, and, under the circumstances, must be presumed to have been made by, or with the consent of, the holder. If so, the whole instrument, by the alteration, became *ipso facto* void. No subsequent endorsement, even to a *bona fide* purchaser for value, could give validity to a void instrument." (*Pahlman v. Taylor*, 75 Ill. 629). The rule seems to be well settled that, in case of a material alteration of a note, it becomes invalid even in the hands of a subsequent endorsee for value.

(*Wade v. Withington*, 1 Allen, 561; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 17).

The trial court, in instructing the jury upon the trial below, announced the law in regard to the effect of a material alteration, as it is above stated. On behalf of the appellant the court gave to the jury the following instruction, numbered 6:

"You are further instructed that, if you believe from the evidence in the case that, when the note sued on was originally made, it contained the words 'one hundred' written in the blank in the body of the note before the printed word 'dollars,' and that, after it was signed and endorsed by Silverman and the defendant, Merritt, it was altered without the knowledge, authority or consent of said Merritt by erasing the word 'one,' and writing in the word 'thirteen' where the word 'one' originally was, then you will find the issues for the defendant."

The judgment of the circuit court in behalf of the plaintiffs below, appellees here, and the affirmance of that judgment by the Appellate Court, are conclusive as to the facts, so far as this court is concerned. The courts below have found, that the note was not altered by erasing the word "one" and writing in its place the word "thirteen."

Second—The second theory of the defense, made by the appellant in the court below, was that, when he signed and endorsed the note, there was a blank space before the word "hundred," and that this blank space was subsequently filled by inserting the word "thirteen" therein without the knowledge or consent of the appellant. The testimony of the appellant is quite positive to the effect, that he signed a note for only \$100.00, but his testimony leaves it doubtful whether, when he signed the note, the words "one hundred" were written in the body of the note, or whether only the word "hundred" was written therein without the word "one" before it and with a blank space before the word "hundred." Appellant at one time

stated "that the note was written either 'hundred' or 'one hundred,' I didn't know which."

Upon the theory that, when the note was signed and endorsed by appellant, the word "hundred" was written in the body of it, but that the word "one" was not written before the word "hundred," and that a blank space was at that time before the word "hundred," which blank space was subsequently filled without the authority or knowledge of the appellant, the liability of the appellant must be determined by the application of principles of law entirely different from those which have already been stated.

As bearing upon the second theory of the defense as thus announced, the court below gave to the jury, upon behalf of the appellees, the following instruction, numbered 1:

"The jury are instructed that, if you believe from the evidence that the note in question was signed and endorsed by the defendant, H. Clay Merritt, and one Silverman, and delivered by Merritt to Silverman to negotiate, and that, at the time said note was so signed and delivered to said Silverman, only the word 'hundred' was written therein, and that a space was left blank before the word 'hundred' sufficient to write therein the word 'thirteen,' and that said Silverman wrote, or caused to be written, in said blank space the word 'thirteen,' so that the body of said note read 'thirteen hundred dollars,' and then sold or caused to be sold the same to the said plaintiffs, and that said plaintiffs purchased said note in the due course of business before maturity for value in good faith and without notice of such change; then the defendant, H. Clay Merritt, is liable in this case for the face of said note and interest thereon, and you should so find by your verdict."

Appellant contends, that the note was only a note for \$100.00 whether the word "one" was written in the body of it before the word "hundred," or whether there was a

blank space before the word "hundred." We are unable to concur in this view. If there was a blank space before the word "hundred," it was not necessarily a note for just \$100.00, but the amount of the note was left blank. In other words, the note was not a complete note, as it would have been if the word "one" had been inserted before the word "hundred" when it was signed. Where the maker of a note delivers it to a third person to be negotiated, and such note, as an undertaking on the part of the maker, is not finished, but is to be afterwards completed, the maker so far makes the person, to whom he so delivers the note, his agent, as to be bound by the acts of the latter to an innocent purchaser of the note. When the maker of a note has himself, by careless execution of the instrument, left room for an alteration to be made by insertion without defacing the instrument, or exciting the suspicion of a careful man, and the instrument, by reason of the opportunity thus afforded, is subsequently filled up with a larger amount than that which it bore at the time it was signed, the maker will be liable upon it, as altered, to any *bona fide* holder without notice. In the hands of such a holder a negotiable instrument may be enforced, if a sum in excess of what was authorized by the maker is inserted in a blank left for the amount of the instrument. (4 Am. & Eng. Ency. of Law, —2d ed.—p. 337; *Abbott v. Rose*, 62 Me. 194; *Fordyce v. Kosminski*, 49 Ark. 42.) In *Angle v. Northwestern Mutual Life Ins. Co. supra*, the Supreme Court of the United States said: "Negotiable instruments are frequently delivered for use, with blanks not filled; and, in respect to such instruments, it is held, that where a party to such an instrument entrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was entrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the

rule is, that, as between such party and innocent third parties, the person to whom the instrument was so entrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument. * * * Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks." In *Young v. Ward*, 21 Ill. 223, this court said: "It is the settled doctrine, that if a party signs his name to a blank paper, and delivers it with authority to fill the blank above his signature with a note or bill for a particular amount, or to a specified person, and the person receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business, without notice of the facts, the maker is bound by the instrument." (2 Daniel on Negotiable Instruments,—4th ed.—sec. 1405.)

In such cases the liability of the maker is placed by some authorities upon the ground of implied authority; that is to say, upon the ground that the maker of the note, by leaving the blank therein, impliedly authorizes the person, to whom he delivers it, to fill the blank. (4 Am. & Eng. Ency. of Law,—2d ed.—p. 337, and cases cited in notes; *Market, etc. Nat. Bank v. Sargeant*, 85 Me. 349; *Spitler v. James*, 32 Ind. 202; *Greenfield Savings Bank v. Stowell*, 123 Mass. 198).

By other decisions the liability of the maker of negotiable instruments with blanks improperly filled is placed upon the ground of negligence on the part of the maker in executing the note with unfilled blanks in it. (*Yocum v. Smith*, 63 Ill. 321; *Harvey v. Smith*, 55 id. 224; *Anderson v. Warne*, 71 id. 20; *Seibel v. Vaughan*, 69 id. 257; *Weidman v. Symes*, 120 Mich. 657).

In the case at bar, the evidence tends to show that the note in question was signed by the appellant with a blank space before the word "hundred." When he had

signed and endorsed the note, he delivered it to Silverman, his joint maker, for the purpose of having it negotiated, or knowing that Silverman intended to negotiate it. Under the circumstances, and in view of the authorities referred to, the appellant was liable to the appellees, as *bona fide* purchasers of the note without notice of any defect in it, whether such liability rests upon the ground of implied authority to Silverman to fill the blank space, or upon negligence on the part of the appellant in leaving the blank space unfilled. By his conduct he either made Silverman his agent with implied authority to fill the blank, or he was guilty of such negligence in leaving the blank unfilled, that an improper and unauthorized filling of it by Silverman cannot be set up as a defense against the appellees, who purchased the note in good faith without notice. (*Johnson Harvester Co. v. McLean*, 57 Wis. 264).

The question here is not exactly the same question, as that which arose in the case of *Yocum v. Smith*, *supra*. In the latter case, the note in controversy was originally made for \$300.00, and was altered after execution and delivery from \$300.00 to \$320.00 without the authority, knowledge or consent of the maker; there, as we understand the facts, the note, as originally drawn, contained the words "three hundred dollars," and, a blank space, which had been left between the words "hundred" and "dollars," was filled by adding the words "and twenty" before the word "dollars," thus making the note a note for \$320.00. In *Yocum v. Smith*, *supra*, the note was a complete note for \$300.00. In the case at bar, however, the note, signed by the appellant, was not a complete note, but was a blank note for "..... hundred dollars," and was made complete by inserting the word "thirteen" before the word "hundred." If the note in the present case had contained the words "one hundred dollars," and the words "and twenty" had been added before the word "dollars," so as to make it "one hundred and twenty

dollars," this case would be on all fours with the case of *Yocum v. Smith*, *supra*.

Counsel for appellant refer to a large number of cases, which hold as follows: "It has now, however, become the established rule that, if the instrument was complete without blanks at the time of the delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration and operate to discharge the maker." (1 Randolph on Commercial Paper,—2d ed.—sec. 187; *Angle v. Northwestern Mutual Life Ins. Co.* 92 U. S. 331; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *Fordyce v. Kosminski*, 49 Ark. 40; *Burrows v. Klunk*, 70 Md. 460; *Knoxville Bank v. Clark*, 51 Iowa, 264; *Holmes v. Trumper*, 22 Mich. 427.) An examination of the facts in the cases last referred to will show that, in each of the cases, the instrument, which was altered, was complete at the time of its delivery. The leading case is that of *Greenfield Savings Bank v. Stowell*, *supra*, the opinion in which was delivered by Mr. Justice Gray, now of the Supreme Court of the United States, then chief justice of the Supreme Court of Massachusetts. In the *Stowell* case, all the decisions upon this subject then extant are reviewed, and the cases are distinguished. There, the note, as originally drawn, was a note for \$67.00 and was altered by inserting the words "four hundred and" in a blank space left before the words "sixty-seven" in the body of the note, and by inserting the figure "4" between the dollar mark and the figures "67" at the top of the note, thus changing a note for \$67.00 into a note for \$467.00. It will be observed that, there, the note, before it was altered, was a complete note for \$67.00. There can be no question that the *Stowell* case, and the other cases above referred to which follow the *Stowell* case, are diametrically opposed to the cases of *Harvey v. Smith*, 55 Ill. 224, and *Yocum v. Smith*, 63 id. 321, above referred to. The latter cases follow and are based upon *Young v. Grote*,

4 Bing. 253, the authority of which the *Stowell* case and the other cases following it regard as having been weakened and shaken by subsequent decisions both of the English and of the American courts.

It is not necessary, however, for us here to discuss the comparative merits of the view taken by this court in *Yocum v. Smith*, *supra*, and *Harvey v. Smith*, *supra*, and the view taken by the cases opposed to them in view of the fact that, in the case at bar, the note was not a complete note as to the amount mentioned in it, as were the notes in *Harvey v. Smith*, *supra*, and *Yocum v. Smith*, *supra*, and in *Greenfield Savings Bank v. Stowell*, *supra*, and the other cases above referred to.

We are of the opinion that the court below committed no error in giving to the jury instruction numbered 1, which was given in behalf of the appellees.

Third—The appellant asked, and the court refused to give, twenty-five instructions numbered from 17 to 42 inclusive. It is claimed by the appellant, that the court erred in refusing to give these instructions. It is impossible for us within the limits of this opinion to examine each one of these instructions separately, and to comment upon the particulars, in which they are claimed to be correct statements of the law. Their refusal constitutes no such error, as would justify us in reversing this judgment. Without considering each instruction separately, it is sufficient to group them under certain general heads, and note their general characteristics.

Some of the instructions announce the same principle, which is embodied in appellant's instruction numbered 6 above quoted. The refusal of these instructions did no injury to the appellant for the reason that the substance of them was given in said instruction numbered 6.

Some of the instructions are based upon the theory, that mere negligence, or a want of proper diligence, is sufficient to deprive the purchaser of a promissory note of the character of a *bona fide* holder thereof. It is claimed,

on the part of the appellant, that there was sufficient upon the face of the note here sued upon to put the appellees, as purchasers thereof, upon inquiry as to the real facts in regard to the execution of the note. There was certainly nothing in the body of the note to excite the suspicion of the holder. While there is some testimony given by experts to the effect that the word "hundred," was written before the word, "thirteen," was written, still there seems to have been room enough to insert the word "thirteen" before the word "hundred" without exciting any suspicion in the mind of a party, proposing to purchase the note, that both words had not been written at the same time. Nor does it appear, that there was anything in the figures, \$1300.00, placed in the upper left hand corner of the note, which would create in the mind of a proposed purchaser the obligation to make inquiry. The only peculiarity about the figures, which counsel for appellant referred to in his offer of proof, was that the two figures 13 were larger than the two ciphers in \$1300.00, and that the ciphers placed after the figures 1300 to indicate that there were no cents, to-wit, \$1300.00, were smaller than the ciphers in the main body of \$1300. We are not prepared to say, that the difference in the size of the figures was such an indication of a defect in the note, as to arouse the suspicion of a cautious man. However this may be, it is the doctrine of this court that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder, but that there must be proof of bad faith on the part of the holder, in order to affect him with notice or knowledge of defects in the note purchased by him.

In *Comstock v. Hannah*, 76 Ill. 530, we endorsed the following proposition (p. 535): "The party who takes it (commercial paper) before due, for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against the world. Suspicion of defect of title, or the knowledge of circum-

stances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. * * * The duty of active inquiry does not rest on the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." Again, in *Shreeves v. Allen*, 79 Ill. 553, we held: "Where a person takes an assignment of a promissory note before due, for a valuable consideration, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against the world, and it will not, in his hands, be subject to the defense of failure of consideration; that mere negligence on the part of an assignee of negotiable paper is not sufficient to deprive him of the character of a *bona fide* holder, and that proof of bad faith, alone, will deprive him of that character." The same doctrine was reaffirmed in *Matson v. Alley*, 141 Ill. 284. (See also *Spitler v. James*, *supra*; *Goodman v. Simonds*, 20 How. 343; *McGrath v. Clark*, 56 N. Y. 36).

The instructions now under consideration were properly refused, because they ignore the rule thus laid down, which requires actual knowledge of an alleged defect, or bad faith, on the part of a holder of a note, to deprive him of the character of a *bona fide* purchaser.

Some of the instructions, asked by appellant and refused, assume that the note in question was a complete note, even though there was a blank, and not the word "one," before the word, "hundred," when the note was signed. They assumed that a note for "..... hundred dollars" is the same as a note for "one hundred dollars." As the opposite view of this question is taken in the remarks above made, we regard these instructions as having been properly refused.

Some of the instructions were properly refused, because they were based upon the theory, that the marginal figures, placed above and outside the body of a note, are a part of the note itself, so that their alteration will necessarily deprive the purchaser of the note of the character of a *bona fide* holder. Such is not the law. It is true that, under certain circumstances, marginal figures may be used to remove doubt or ambiguity in an instrument. "The marginal figures have been held to be no part of the instrument, but to be intended merely as a convenient index, and as an aid to remove ambiguity or doubt in the instrument itself." (4 Am. & Eng. Ency. of Law,—2d ed.—p. 130; *Norwich Bank v. Hyde*, 13 Conn. 279; *Riley v. Dickens*, 19 Ill. 29; *Corgan v. Frew*, 39 id. 31). Marginal figures are really not a part of the instrument, but merely a memorandum of the amount. (1 Daniel on Negotiable Instruments,—4th ed.—sec. 86). An alteration or erasure of the marginal figures is an immaterial alteration, and will not affect the rights of the holder of the instrument. (2 Daniel on Negotiable Instruments,—4th ed.—sec. 1499a). It has been held that, where the amount is left blank, and the marginal figures are altered to a larger sum, and the blank is filled to correspond, the acceptor of the blank bill is liable to a holder without notice. (*Garrard v. Lewis*, 10 Q. B. Div. 30; *Johnson Harvester Co. v. McLean*, *supra*). In *Garrard v. Lewis*, *supra*, it was said: "No alteration, (even if it be fraudulent and unauthorized) of the marginal figure vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered." It was there further said: "If the holder in the absence of notice would have a right to neglect the marginal figure if it remained unaltered, and to look only to the body of the bill, it would seem to follow that, even if the marginal figure was altered, the holder would have a right in the absence of notice to assume it was altered properly. The holder's

right to look to the body of the bill would not be affected, by such alteration if he did not know the alteration was improper. *A fortiori*, his right to look to the body of the bill would remain the same when he did not know that the marginal figure had undergone any alteration at all."

In *Johnson Harvester Co. v. McLean*, *supra*, it was contended that the note was vitiated, because there was an alteration of the figures in the margin of the note which was unauthorized, and, in answer to this, the court said "that the figures were not a part of the note; and further that, if any alteration of the figures was made, such alteration was not known to the parties receiving the note, and there was nothing on the face of the note which would indicate that such alteration had been made."

In *Schrivver v. Hawkes*, 22 Ohio St. 308, it was held "that the marginal figures were no part of the note, and an alteration of them, and the filling up of the blank for a higher amount would not invalidate the instrument as to a surety. This is certainly the rule where the alteration is made possible by the maker's negligence, *e. g.*, where the amount was left blank except a marginal memorandum of '\$500,' and this was altered to \$5000 and the blank filled for that amount, the maker was held liable to a *bona fide* holder for such increase of the amount." (*Woolfolk v. Bank*, 10 Bush. 504; *Randolph on Commercial Paper*,—2d ed.—sec. 187, note 158).

In *Smith v. Smith*, 1 R. I. 398, the court said: "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration either material or immaterial in the contract." (*Hollen v. Davis*, 59 Iowa, 444; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12; *Garrard v. Haddan*, 67 Pa. St. 82; *Horton v. Estate of Horton*, 71 Iowa, 448). As the record in the case at bar is presented

to us, there is no evidence that any alteration in the figures, if the same was material, was known to these appellees when they purchased the note; nor does it appear that there was anything on the face of the note, which would indicate that any alteration had been made.

Some of the instructions were erroneous, as leaving it to the jury to determine from an inspection of the face of the note, whether there had been any alteration in the marginal figures upon the same. In *Goodman v. Simonds*, 20 How. 343, the Supreme Court of the United States, said: "Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question, whether a party, who took it, had notice or not, is in general a question of construction, and must be determined by the court as matter of law." (*Riley v. Dickens*, *supra*; *Prins v. South Branch Lumber Co.* 20 Ill. App. 236; *Horton v. Estate of Horton*, *supra*).

It is true that, where an alteration appears on the face of the note, the holder must explain it, and show that it was made under such circumstances as not to vitiate the instrument. (3 Randolph on Commercial Paper,—2d ed.—sec. 1785; *Walters v. Short*, 5 Gilm. 252; *Hodge v. Gilman*, 20 Ill. 437). In the case at bar, the note was admitted in evidence by the court upon an inspection thereof. The presumption is, that there were no alterations apparent upon the face of the note, which required explanation, or the court would not have admitted it in evidence without first calling for proof explaining the alterations. Whether or not the court erred in so admitting the note without requiring such explanatory proof, is a matter, which cannot be determined by us, because the original note has not been produced for our inspection. Such a course should have been pursued. (*Riley v. Dickens*, *supra*; *Yocum v. Smith*, *supra*; *Prins v. South Branch Lumber Co.* *supra*).

Some of the instructions are erroneous, as leaving it to the jury to determine the question of implied knowl-

edge and implied authority, whereas express knowledge and express authority are questions of fact, and implied knowledge and implied authority are questions of law. (*Pahlman v. Taylor*, 75 Ill. 629).

Fourth—Appellant complains that the trial court erred in refusing to allow him to introduce proof to show that he had signed numerous other notes for Silverman, and that they had been altered in amount and negotiated for different sums of money. We concur in the following view upon this subject, expressed by the Appellate Court in its decision in this case: "It was not claimed, however, that the appellees ever held any of these notes, or were in any way connected with or aware of them, at the time they purchased the note in question, and the court properly sustained objection to this proof."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

MR. JUSTICE HAND, having been of counsel in this cause in the court below, took no part in its decision here.

THE FOREMAN SHOE COMPANY

v.

F. M. LEWIS & CO., for use, etc.

191	155
194	*100

Opinion filed June 19, 1901.

1. ABATEMENT—*suits for different uses may be prosecuted at same time.* The pendency of a suit brought for the use of one person is not ground for abating a subsequent suit brought on the same cause of action and in the name of the same nominal plaintiff but for a different use.

2. PRACTICE—*effect when parties go to hearing on plea in abatement.* If the parties, by agreement, submit the case to the court for decision upon the issue made by the declaration, plea in abatement and replication, and the defendant takes the initiative and introduces all the evidence on the issue in abatement but is defeated thereon, nothing remains to be done but to ascertain the amount which the plaintiff is entitled to recover.

3. SAME—*failure to enter formal default as on partial defense is merely technical.* Failure to enter formal default as on partial defense is merely technical, and if no objection is made in the trial court it cannot be raised on appeal.

4. SAME—*extent to which defendant may participate after defeat on a plea in abatement.* If the defendant is in default as to all issues except the one made by his plea in abatement, upon which he is defeated, he is entitled to participate in the investigation only for the purpose of reducing the amount of plaintiff's recovery.

Foreman Shoe Co. v. F. M. Lewis & Co. 92 Ill. App. 554, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

EDWARD N. D'ANCONA, for appellant.

W. CLYDE JONES, KEENE H. ADDINGTON, and A. MORRIS JOHNSON, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This appeal brings in review the judgment of the Appellate Court for the First District affirming the judgment entered against the appellant company in the superior court of Cook county for the sum of \$1974.16, in favor of the appellee corporation, the nominal plaintiff, for the use of the beneficial plaintiff, W. P. Liston.

The declaration, which was in assumpsit, declared on a written contract entered into by and between the appellant company and the nominal plaintiff, whereby the appellant corporation employed the nominal plaintiff, the F. M. Lewis & Co. corporation, to paint or write certain advertising signs for a stated compensation. The declaration alleged the performance of the conditions by Lewis & Co., and sought judgment for the use of said Liston. But a single plea was filed, viz., a plea in abatement that the plaintiff had, prior to the institution of this action, instituted an action in the circuit court of Cook county in assumpsit, against the appellant, on the same

promises and undertakings in the declaration here filed, and that such prior action was still pending and undetermined in said circuit court. A jury was waived and the cause was submitted to the court for decision. The appellant company produced in evidence the transcript of the record in an action of assumpsit in the case of F. M. Lewis & Co., for the use of Dana S. Vilas, receiver, etc., against the appellant. It appeared from this transcript the suit therein referred to was upon the same contract set forth in the declaration in the present action, and alleged the same breaches of the contract, and that it was instituted prior to the present action and was still pending in said circuit court.

The contention of appellant as to the requirement it should be made to appear, in order to support its plea, that the prior action was between the same parties as the present suit, is, that the nominal plaintiff is the same in both actions and that it is wholly immaterial that the beneficial plaintiffs are different persons. We are reminded we have held that an action at law must run in the name of the nominal plaintiff; that the person equitably entitled to the proceeds of the judgment, the usee or beneficial plaintiff, need not be named in the record at all; that the addition of the name of the latter is simply to enable him to protect his interest as against the nominal plaintiff; (*Zimmerman v. Wead*, 18 Ill. 304; *American Express Co. v. Haggard*, 37 id. 465; *Tedrick v. Wells*, 152 id. 214; *Hobson v. McCambridge*, 130 id. 367;) that it is error to enter a judgment at law in the name of the beneficial plaintiff alone; (*Hobson v. McCambridge*, *supra*;) that in an action in the name of the nominal plaintiff for the use of a beneficial plaintiff, an order granting an appeal to the "plaintiff" does not, under the statute, give the party named as beneficial plaintiff the right to appeal. (*Tedrick v. Wells*, *supra*.) Such is the doctrine of these cases. We do not, however, assent to the argument that it must logically follow that the pendency of an action brought

in the name of a nominal plaintiff will preclude the prosecution of another suit on the same cause of action in the name of the same nominal plaintiff, for the use of another as beneficial plaintiff.

At an early day, courts of law were impressed with the harshness of the operation of the strictly legal rule that an action at law can only be maintained in the name of the person in whom the legal title or legal right rests, and in order to obviate the injustice which would result to assignees and others having actual rights and interests to be preserved, invested, from time to time, the owners of such equitable rights and interests with various privileges in relation to the enforcement of such rights in courts of law, which has resulted in giving such equitable owners a substantial and well recognized standing as litigants in such courts. An equitable owner of a chose in action is entitled, by virtue of such ownership, to bring an action at law in the name of the party having the legal right, for his use. Such legal plaintiff can not prevent the use of his name in the action, nor can he arrest or discontinue the suit, save on the failure of the usee to secure him against liability for costs. (*Sumner v. Sleeth*, 87 Ill. 500; *Jenkins v. Pope*, 93 id. 27; 15 Ency. of Pl. & Pr. 491, 492.) By statute, in this State the suit brought in the name of a nominal plaintiff, for the use of another, does not abate on the death of such nominal plaintiff, nor does it survive to the legal heirs or representatives of the nominal plaintiff, but proceeds to final judgment in the name of the usee. (1 Starr & Cur. Stat. 1896, chap. 1, sec. 23, p. 259.) The defendant cannot take advantage of the fact the nominal plaintiff has no real interest in the litigation, but is required to regard the usee as the real plaintiff, unless he puts in issue, by proper plea, the right of the usee to recover on the chose in action. The defendant may avoid judgment by establishing a set-off against the beneficial plaintiff to an amount equal to the plaintiff's demand. (*Rothschild v.*

Bruscke, 131 Ill. 265.) The defendant, if he prevails, may recover judgment against the usee for costs and enforce the judgment by execution. (See Rev. Stat. chap. 33, sec. 19.) When the usee is a non-resident of the State, the statute with reference to costs requires a bond to secure the costs shall be given by such usee, he being regarded as the real plaintiff in the action. (*Smith, for use, etc. v. Robinson*, 11 Ill. 119.) The beneficial plaintiff is so far the real plaintiff as that he may pray for and be granted a change of venue. (*Jenkins v. Pope*, 93 Ill. 27.) It was said in *Sumner v. Sleeth, supra*: "It has long been the practice of courts of law to look through the nominal parties to the rights of the real parties in interest." And in *Jenkins v. Pope, supra*, in adverting to the rights of a beneficial plaintiff, we said: "He is undoubtedly named as the party who is entitled to the benefit of the recovery, and the court in such cases recognizes him as the real party, and gives him the entire control of the process and management of the suit, to its termination, and of the judgment when recovered, and of the process for its enforcement." And in *Boynton v. Phelps*, 52 Ill. 210, we remarked: "That a party for whose use a suit is brought is the real party to the action has often been held by this court."

The beneficial plaintiff in the case at bar, Liston, is the only person who has an interest in the recovery in the action; is liable for costs; has the right to control the process and the course of the suit; may prosecute or dismiss it, and, if he recover judgment, may collect the same and enter satisfaction thereof. He has all the substantial and actual rights and interests of a real plaintiff and possesses full power to act as if he were the nominal plaintiff, and we agree with the trial court and the Appellate Court that his attitude in the case and his standing before the court were such that his suit could not be abated by showing that a prior suit was pending on the same cause of action for the benefit of another alleged

usee or beneficiary. His right to use the name of the legal plaintiff might have been put in issue by proper pleading, (15 Ency. of Pl. & Pr. 498,) but his right of action cannot be precluded by showing that another person, as beneficial plaintiff, had employed the name of the nominal plaintiff in a prior pending suit on the same cause of action.

The objection is not well taken that the court erroneously ruled that appellant's right of cross-examination of the witnesses produced on behalf of appellee should be restricted to such interrogatories as tended to secure a reduction of the appellee's recovery. The appellant tendered no defense by its pleading other than that set out in the plea in abatement. It was actually in default on all other issues in the case. A default as on partial defense was not entered in form, but the failure to do so was merely technical and entirely harmless. (6 Ency. of Pl. & Pr. 56.) The parties having, by agreement, submitted the cause to the court for hearing and decision without a jury, on the issue made by the declaration, the plea in abatement and the replication thereto, and the appellant having taken the initiative and produced all its evidence on the issue of abatement, and having been defeated therein, nothing remained to be done but to ascertain the amount which the plaintiff was entitled to recover. This the court proceeded to do as though a formal default on partial defense had been entered. No objection was then interposed that such formal entry had not been made, and none can now be made. In the investigation of the question of the amount of the plaintiff's damages the appellant had the right to participate only for the purpose of reducing the recovery. (*Cook v. Skelton*, 20 Ill. 107; *Cairo and St. Louis Railroad Co. v. Holbrook*, 72 id. 419.) Its right of cross-examination was, therefore, accordingly restricted.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

KATHERINA LANG

v.

MARGARETHA DIETZ.

Opinion filed June 19, 1901.

1. **CONTRACTS**—*verbal promise to pay mortgage debt as part of consideration is valid.* A verbal promise to pay an existing mortgage debt as part of the consideration in a purchase of the property is an assumption of the mortgage debt, and may be enforced by the grantor or the holder of the mortgage.

2. **SAME**—*grantee who has assumed mortgage debt cannot dispute consideration for mortgage.* A grantee who, as part of the consideration for the conveyance to him, has assumed a mortgage debt upon the property, is estopped to dispute the validity of the mortgage upon the ground there was no consideration for the mortgage debt; and this estoppel extends to those claiming under him.

Lang v. Dietz, 93 Ill. App. 148, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

LACKNER, BUTZ & MILLER, for appellant.

NELSON MONROE, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from the judgment of the Appellate Court for the First District affirming a decree entered in the superior court of Cook county awarding foreclosure of a trust deed in the nature of a mortgage, on a bill in chancery exhibited by appellee against the appellant and others. The appellant is the widow of one John George Lang, deceased, and the other defendants to the bill were a brother and several nephews and nieces of said deceased, none of whom join in the appeal. The defense sought to be made was and is that there was no

consideration for the note to secure which the mortgage was given.

John George Lang was twice married, but no children were born to him by either wife. His first wife, Susanna Lang, owned lot 12 in Wallar's subdivision of the north-east quarter of section 28, township 39, north, range 14, east of the third principal meridian, in Cook county. The appellee, when but two years of age, was taken into the family of said Susanna and John George Lang and was cared for and treated as their child. She sustained that relation to them until she had reached the age of thirty years, and faithfully served, assisted and cared for them during that period of time. On the 21st day of July, 1893, said Susanna and John George Lang executed a note in the sum of \$2000, payable to the appellee five years thereafter, without interest, and on the same day signed and acknowledged a trust deed in the nature of a mortgage on said lot 12, which belonged to the wife, Susanna, as aforesaid, to secure the payment of the note. The decree was rendered to foreclose this trust deed. Susanna Lang died August 7, 1893, about two weeks after the execution of said note and trust deed. John George Lang intermarried with the appellant in about eighteen months after the death of Susanna, his first wife, and died on the 26th day of September, 1896, leaving the appellant his widow but no child or children or descendants thereof him surviving. The appellant and said brother and said nephews and nieces are his legal heirs. The bill in chancery was brought after his death to foreclose the mortgage held by the appellee.

The contention of the appellant is, that said Susanna Lang, being ill and in the expectation of death, executed the note and mortgage as a gratuity,—a mere gift,—to the appellee; that the services rendered by the appellee while so a member of the family of the makers of the note and mortgage were rendered without any express or implied agreement that she was to be compensated

therefor, and without intention on her part to charge for such services or expectation to be paid therefor, and can not be seized upon as constituting a consideration for the note.

A promissory note intended as a gift is but a mere promise to make a gift in the future, and is lacking in consideration. (*Shaw v. Camp*, 160 Ill. 425.) The execution of a mortgage to secure such a note does not give it the character of an executed promise or aid to supply a consideration. (*Grove v. Jeager*, 60 Ill. 249.) In the absence of an express or implied contract for wages or compensation, the implication of the law is there was no intention on the part of the appellee to charge for her services or assistance, or on the part of said Susanna or John George Lang to pay therefor, or to charge said appellee for her board, clothing or support. (*Miller v. Miller*, 16 Ill. 296; *Brush v. Blanchard*, 18 id. 46; *Faloon v. McIntyre*, 118 id. 292; *Dunlap v. Allen*, 90 id. 108.) The case of *Warren v. Warren*, 105 Ill. 568, announces no different doctrine, and in principle is not in conflict with the cases above cited. In the *Warren case* compensation was allowed the daughter on the ground the law would imply a contract to compensate her, from facts and circumstances established by the proof.

If it be conceded in the case at bar it was not made to appear in the proofs that there was a contract or understanding, express or implied, the appellee was to be paid for her services, still we think the judgment of the Appellate Court and the decree of the superior court should be upheld. It was proven by the testimony of the notary public who wrote the note and trust deed or mortgage and before whom those instruments were signed and the mortgage acknowledged, that he was called to go to the house of Mr. and Mrs. Lang, and on arriving there found Mrs. Lang ill and confined to her bed. Her husband, John George Lang, was there. Mrs. Lang said to the notary that she was old and sick and did not know but that she

would soon die, and that she intended to give the appellee (whom she called her adopted daughter) something to pay her for her services and labor during the many years she had lived with her and her husband; that she wanted to give her \$2000 in cash, and would pay her then but that she did not have the money, and asked the notary if he could not prepare a paper that would secure that sum to the appellee. The notary told her it could be done by a note and trust deed. She directed the notary to prepare the note and trust deed. John George Lang, her husband, objected to giving the note and trust deed, and said to Mrs. Lang that he would take care of the appellee in case of the death of Mrs. Lang. Mrs. Lang said to her husband, in substance, that she could not trust him to pay the money to or take care of the girl; that she believed that if she was dead he would drive the girl away and do nothing for her; that he drank too much, etc., but that she would have the note drawn so that the appellee could not require him to pay it at once. Thereupon the note was drawn payable five years after date, and was signed by Mrs. Lang and her husband, and they both signed and acknowledged the trust deed, and both instruments were left in the possession of Mrs. Lang. On the following day the notary was again called to the house of Mr. and Mrs. Lang, and by her direction prepared a quit-claim deed conveying the same premises covered by the trust deed, from herself to her husband, John George Lang. Mrs. Lang signed the deed and acknowledged it before the notary. She then delivered to the notary the note to the appellee, the trust deed securing it and the quit-claim deed to her husband, with directions to deliver the note and trust deed to the appellee and the said quit-claim deed to her husband, said John George Lang, after her death. These instruments remained in the possession of the notary until after the death of Mrs. Susanna Lang, when he delivered them as directed to do by Mrs. Lang. John George

Lang died seized of the title thus vested in him by this quit-claim deed. The interest of the appellant, the second wife of said John George Lang, in the said premises is such as resulted to her as his wife under the statutes of descent, from his death without leaving child, children or descendants thereof him surviving. If the lien of the trust deed or mortgage was good and effectual as to said John George Lang it would be equally efficacious against her.

On the day preceding that on which said John George Lang received a quit-claim deed for the premises here involved he had joined with his wife in the execution of the note to the appellee and in the execution of the mortgage on the premises to secure that note. It was then fully explained to him that he was expected to make payment of the note; that his verbal agreement to do so would not be taken; that the premises which the wife owned, and which were to be his after the death of the wife, were to be charged with a lien to secure the payment thereof, but that the note would be so drawn that he could not be compelled to pay it until the expiration of five years. He agreed to these conditions, signed the note as one of the principals thereof and signed and acknowledged the mortgage. The note and mortgage were retained by the owner of the property until the quit-claim deed to him was executed, and then the note, the mortgage and the quit-claim deed were delivered together to Mr. Oehmen, the notary public, as aforesaid. The instruments, under all the circumstances, may properly be regarded in equity as but parts of the same instrument,—so far, at least, as to give to the deed the same effect as if it contained a clause requiring the grantee therein to pay the mortgage debt. The quit-claim deed executed to him on the day following the one on which the note and mortgage were made and executed was subject to the payment of the mortgage debt, and he became, by virtue of the deed, the note which he had signed and the mort-

gage in which he had joined, legally liable for the payment of the mortgage indebtedness as fully as if a clause had been inserted in the deed obligating him to make such payment. The payment of the mortgage debt by him was a part of the transaction whereby he obtained title to the lot, and the obligation to pay it was in part the consideration on which the conveyance to him was based.

A verbal promise to pay an existing mortgage debt as part of the purchase money of mortgaged premises is an assumption of the mortgage debt, and may be enforced by the grantor or the holder of the mortgage. (15 Am. & Eng. Ency. of Law,—1st ed.—p. 835.) Here, however, there is more than a mere verbal promise on the part of said John George Lang to pay the debt secured by the mortgage. He signed the note secured by the mortgage and executed the mortgage to secure it. A grantee of land who, as part of the consideration for the conveyance to him, has assumed to pay a mortgage debt on the land so purchased by him, cannot dispute the validity of the mortgage or avoid liability on the ground there was no consideration for the mortgage debt. *Pidgeon v. School Trustees*, 44 Ill. 501; 15 Am. & Eng. Ency. of Law,—1st ed.—p. 836; *Freeman v. Auld*, 44 N. Y. 50; *Johnson v. Thompson*, 129 Mass. 398; *Smith v. Graham*, 34 Mich. 305.

The appellant, so far as she succeeded, under the statutes of descent, to the title of said John George Lang in the premises, obtained no greater interest than her husband had, and the estoppel against him to question the validity of the mortgage extended also to her. Her dower rights were such, only, as a widow acquires in land which the husband had mortgaged prior to their marriage,—namely, dower in the surplus remaining after the payment of the mortgage debt. *Virgin v. Virgin*, 189 Ill. 144.

The chancellor did not err in rendering the decree nor the Appellate Court in affirming it. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE GLOBE MUTUAL LIFE INSURANCE ASSOCIATION

v.

AMELIA AHERN, Admx.

191 167
108a 1551

Opinion filed June 19, 1901.

1. EVIDENCE—*burden of proving falsity of insured's statements is on the defendant.* In an action on a life insurance policy, the burden is on the defendant to prove the falsity of statements of the insured which it is claimed vitiate the policy.

2. INSURANCE—*agent's knowledge of falsity of answers will permit recovery.* To permit a recovery on an insurance policy notwithstanding the falsity of answers by the insured to questions contained in his application, it is sufficient if the agent of the insurance company knew the falsity of such answers.

Globe Mutual Life Ins. Ass. v. Ahern, 92 Ill. App. 326, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

The appellant insurance association on May 4, 1895, issued its policy of insurance to John Ahern upon his written application therefor, agreeing to pay the sum of \$1000.00 to the legal representatives of said Ahern within sixty days after the acceptance of proof of death of said assured, at a premium of \$5.24, payable on or before the fourth days of May, August, November and February in every year during the existence of the contract. The policy provides, that any failure or neglect to make the payments of the premiums at the time and in the manner, specified in the policy, shall determine the contract.

Ahern died March 6, 1898, and letters of administration upon his estate were issued to appellee. Proofs of the death of Ahern were duly and regularly made, but the association refused payment upon the policy, and

appellee brought suit thereon against appellant in the superior court of Cook county, declaring specially on the contract. The association pleaded the general issue and thirteen special pleas, to which replications were filed, and a demurrer to the replications was sustained and carried back to the pleas, except the general issue, whereupon, by agreement in open court, it was ordered that the association might offer in evidence under the general issue any defense that it might make under any special plea well pleaded. A trial before the court and a jury resulted in a verdict for appellee of \$1068.75 and judgment thereon, from which an appeal was taken to the Appellate Court.

The Appellate Court has affirmed the judgment of the superior court, and the present appeal is prosecuted from such judgment of affirmance.

It was contended, upon the trial in the court below, that, on March 7, 1895, the insured, John Ahern, had made application to the Prudential Insurance Company of America for a policy of insurance for \$500.00, and that the application was rejected. In his application to appellant association on April 25, 1895, the deceased stated that he had never been rejected by any other company. The principal question of fact upon the trial below was whether his statement in his application to the appellant association, that he had never been rejected by any other company, was true or not.

At the close of the plaintiff's evidence upon the trial below, and at the close of all the evidence, counsel for defendant moved the court to give a written instruction to the jury, which was then presented, to find the issues for the defendant. This instruction was refused.

L. A. SEYMOUR, for appellant.

KICKHAM SCANLAN, and EDGAR L. MASTERS, for appellee.

Per CURIAM: In deciding this case the Appellate Court delivered the following opinion, with the exception of certain portions thereof which are omitted as indicated by the stars:

"It is claimed that the court erred in refusing the instruction to find the issues for defendant, but we think the contention is not supported by the evidence in the record.

"The principal contest on the trial was as to the truth of the statement of the assured in his application for the policy, that he had never made an application for insurance to any other insurance company and been rejected. The assured answered, in response to questions in his application for the policy in question, in effect that no company had ever declined to grant insurance on his life. The burden of proving the falsity of this statement was upon the appellant. The evidence upon the point is conflicting, and justified the jury in finding that the answer was not untrue. * * *

"A further claim is made, that Ahern's policy lapsed in November, 1896, and that he procured a re-instatement, based upon his false statement that he was then in as good a state of health, as when his policy was issued. The burden was upon appellant to establish the falsity of this statement, as to which there is a conflict in the evidence; and we cannot say that the verdict of the jury can in this respect be said to be manifestly against the evidence. * * *

"It is said, that the plaintiff's second instruction was erroneous in that it assumes that the appellant had an agent, and that the person who filled out the assured's application was its agent. The criticism is not well founded, because the instruction requires the jury to make its findings from the evidence.

"It is also said the court erred in refusing the defendant's first instruction, which is based upon the theory of collusion or conspiracy between the assured and the agent of the Prudential Insurance Company. There is

no evidence in the record justifying any such instruction, and it was therefore properly refused.

"The further claim is made that the defendant's third instruction should not have been refused. The substance of it is covered by other instructions given, and, besides, it was improper and calculated to mislead the jury, in that it permits a verdict for defendant in case of a false answer to any question propounded in the application, however immaterial that answer might have been, unless the defendant knew, when it issued the policy, that such answer was false. It is sufficient that an agent of defendant should know of the falsity of such answer to allow a recovery. (*Security Trust Co. v. Tarpey*, 182 Ill. 52.) It is true that the agent's knowledge would be the defendant's knowledge, but a jury might not so understand it, and the instruction was therefore calculated to mislead.

"Other points made by counsel we deem it unnecessary to refer to specifically; suffice it to say we have considered them all, are of opinion that there is no substantial error in the record, and that the judgment should be affirmed, which is done."

After a careful examination of the evidence in the record we are satisfied that it tends to establish the cause of action, and, therefore, the trial court committed no error in refusing to instruct the jury to find the issues for the defendant below. For the reasons given by the Appellate Court in their opinion, the trial court committed no error in giving the second instruction which was given for the plaintiff below, or in refusing the first and third instructions asked by the defendant below.

We concur in the views above expressed by the Appellate Court, and in the conclusion reached by them; and, therefore, the judgment of that court is affirmed.

Judgment affirmed.

BENEDICT FISCHBACK

v.

THE PEOPLE *ex rel.* Tetherington, County Treasurer.

Opinion filed June 19, 1901.

191	171
118a	270

1. SPECIAL ASSESSMENTS—*objections available at confirmation can not be made to application for sale.* Under section 66 of the Local improvement act of 1897 no defense or objection can be made or heard, on application for judgment of sale, which might have been interposed in the proceeding for the making of the assessment or on the application for confirmation thereof.

2. SAME—*what not an available objection on application for sale.* That the completed paving improvement deprives the objector of a sidewalk in front of his property is not a valid objection on application for judgment of sale, where it is shown that the improvement was completed in strict conformity with the ordinance and the maps, plans and detail drawings prepared by the city engineer, on file in his office and referred to in the ordinance, and where no satisfactory reason appears why the objector could not have appeared and filed his objections on application for confirmation.

APPEAL from the County Court of Madison county; the Hon. WILLIAM P. EARLY, Judge, presiding.

DUNNEGAN & LEVERETT, for appellant.

L. D. YAGER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

On the application of the county collector of Madison county for a judgment of sale of appellant's lot in the city of Alton for the first installment of a special assessment levied to pay his proportion of the cost of paving Washington street, extending along the front of such property, the appellant appeared and filed objections to judgment, in substance, first, that there was no sufficient description of the property in the published notice of the application; second, that the improvement for which the assessment was levied was not made in accordance with

the ordinance; and third, that the improvement as made deprives objector of a sidewalk in front of his property.

As to the first objection, we find no substantial defect in the description, and as counsel for appellant make no mention of this objection in their brief or argument it must be regarded as waived. Inasmuch as we are of the opinion that the other two objections were properly overruled for other reasons, we need not consider the question raised by appellee that the ordinances given in evidence by appellant and set out in the record were not sufficiently proved and were improperly admitted in evidence.

It appears that in September, 1899, the city council passed an ordinance providing for the paving of Washington street with brick for the width of forty-two feet, and for the paying of the cost of the work by special assessment levied upon property specially benefited. The assessment was made on such property, including appellant's lot, and was duly confirmed by the county court, after notice to the property owners, including appellant. It does not appear that appellant appeared or filed any objections to the confirmation, and his counsel say in their brief that he does not object to the improvement of the street, but only to its being done in such a manner as to deprive him of a sidewalk in front of his property. After the judgment of confirmation, and in 1900, while the work was in progress, appellant objected to it because, as he claimed, there would be no room left for a sidewalk in front of his lot. It further appears that afterward the city council passed an ordinance which defined the lines and width of the space for a sidewalk on that side of the street, and which reduced the width of such space from the uniform width of twelve feet, as theretofore by ordinance provided, to a width, from the curb line of the street as paved and improved, which varied from twelve feet to four and two-tenths, according to the lot lines fronting on said street. There was

some evidence that the city had theretofore constructed the sidewalk and placed it over the line on appellant's lot instead of in front of it, and that appellant had recovered damages for the trespass, (*City of Alton v. Fishback*, 181 Ill. 396,) and appellant testified that the curb of the improved street touched at some points on his property, but there was no evidence adduced showing where the true line was. It appears, however, from the evidence, that the improvement was made in strict conformity with the ordinance authorizing it and the maps, plans and detail drawings prepared by the city engineer, referred to in the ordinance and which were on file in his office, and no sufficient reason appears why appellant could not have made and filed his objections in the county court on the application for confirmation. Section 66 of the Local Improvement act of 1897 provides, that on application for judgment of sale "no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof." It may be that the actual construction of the improvement brought more directly and forcibly to his attention the fact, if it be a fact, that his property would not be benefited, or benefited to the extent it was assessed, by the improvement, than was done by the ordinance and its accompanying maps and plans. Still, that would not give him the right to appear and make the same objections on the application for sale that he should have made on the application for confirmation. It was not shown that the location of the improvement had been changed or was different from the one provided for in the ordinance, but only that a subsequent ordinance was passed changing the width of the sidewalk. The sidewalk ordinance did not change or purport to change the ordinance under which the improvement was made, nor to affect the improvement in any way.

Counsel cite and rely on *Carter v. City of Chicago*, 57 Ill. 283, to support the proposition that the city council had no power to appropriate so much of the street for roadway purposes whereby abutting property owners would be deprived of a sidewalk in front of their premises. We do not understand counsel to insist that the ordinance for the improvement was and is void for lack of power of the city council to pass it, but if such were their contention and the equitable doctrine announced in *Carter v. City of Chicago*, *supra*, were applicable here, we could not find, from the meager evidence in this record, that appellant is deprived of a sidewalk in front of his property.

The judgment must be affirmed.

Judgment affirmed.

BARBARA LENNARTZ

v.

KATE F. QUILTY *et al.*

Opinion filed June 19, 1901.

1. MORTGAGES—*effect of release of trust deed without consent of cestui que trust.* The release of a trust deed by the trustee without authority and without the payment of the note secured thereby does not discharge the lien as between the original parties, nor as to subsequent purchasers chargeable with notice of breach of trust.

2. RECORDING LAWS—*purchaser may rely upon records in absence of other notice.* Public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security, unless he has notice or is chargeable with notice of some title, claim or conveyance inconsistent therewith.

3. SAME—*purchaser need not inquire whether note secured by released trust deed has been paid.* In the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record.

4. NOTICE—*what not a circumstance to excite inquiry as to validity of release.* That a release of a trust deed is recorded before five years after date of the note secured by the deed, at which time it would be absolutely due, is not a circumstance to excite inquiry, where the note is payable, at the option of the makers, on or before five years after date.

5. EVIDENCE—*when an abstract of title is admissible in evidence.* In order to show good faith upon the part of the purchaser of property it is proper to admit the abstract of title in evidence, in connection with the testimony of the attorney who examined it, to prove that the purchaser relied upon the record and the written opinion of the attorney as to the state of the title.

Lennartz v. Quilty, 92 Ill. App. 182, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES H. DONNELLY, Judge, presiding.

F. P. READ, for appellant:

The court erred in dismissing appellant's bill and amended bill for want of equity, and in not decreeing foreclosure as prayed for therein.

Notes payable "on or before" a fixed time have been held to be negotiable, and not to be due before the expiration of the time particularly named. 11 L. R. A. 748, and cases cited; 4 Am. & Eng. Ency. of Law, (2d ed.) 92; *Mattison v. Marks*, 31 Mich. 421; *McCarty v. Howell*, 24 Ill. 341; *Cisne v. Chidester*, 85 id. 523; *Hunter v. Clarke*, 184 id. 158; *Dorsey v. Wolff*, 142 id. 593.

Although such notes might be paid earlier than the particular date named, such earlier payment can only be regarded as "a payment in advance of the legal liability to pay." *Mattison v. Marks*, 31 Mich. 421.

Mrs. Quilty, at the time she bought the property from Behrend, having knowledge from the public records that appellant's note would not be due for nearly three and one-half years, must be regarded as charged with notice of the fraud about to be perpetrated upon her by Behrend. 1 Story's Eq. sec. 146; 8 Am. & Eng. Ency. of Law, 758;

Anderson v. Warne, 71 Ill. 22; 2 Perry on Trusts, (2d ed.) sec. 828; 1 Perry on Trusts, (2d ed.) sec. 217.

A release executed by the trustee in a deed of trust without the authority of the *cestui que trust* and without the payment of the debt secured thereby does not discharge the lien, and is void even against subsequent purchasers or mortgagees without notice. *Harris v. Cooke*, 28 N. J. Eq. 345; 1 Jones on Mortgages, (4th ed.) sec. 954, p. 920; *Lakeman v. Robards*, 9 Mo. App. 179; *Fidelity Co. v. Railroad Co.* 32 W. Va. 244; *Barbour v. Mortgage Co.* 102 Ill. 124; *Heyder v. Building Ass.* 42 N. J. Eq. 403; *Banking Co. v. Woodruff*, 1 Greene's Ch. 117; *Stiger v. Bent*, 111 Ill. 328; *Stockton v. Fortune*, 182 id. 462; *Land Co. v. Peck*, 112 id. 443; *Harrison v. Railroad Co.* 4 C. E. Greene, 488.

Cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident or mistake; and if he does this, his rights under the mortgage will not be affected by its improper cancellation. *Stanley v. Valentine*, 79 Ill. 544; *Chandler v. White*, 84 id. 435; *Fidelity Co. v. Railroad Co.* 32 W. Va. 266.

KERR & BARR, (O'DONNELL & COGHAN, of counsel,) for appellees:

The note held by appellant was payable on or before five years. It was therefore due, at the option of the maker, at any time. The release was regular in form and was acknowledged and recorded before Mrs. Quilty bought, and she and her heirs should be protected. *Mann v. Jummel*, 183 Ill. 523; *Carey v. Rauguth*, 82 Ill. App. 418.

The release of the trust deed which secured appellant's note was *prima facie* valid, and a purchaser had a right to rely upon the record. *Battenhausen v. Bullock*, 8 Ill. App. 312; *Ogle v. Turpin*, 102 Ill. 148; *Mann v. Jummel*, 183 id. 532; *Porter v. McNabney*, 77 id. 235.

The equity of Mrs. Quilty was at least equal to the equity of appellant. She got the legal title, and her

position is therefore superior to that of appellant. *Mann v. Jummel*, 183 Ill. 531.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Nora Behrend, being the owner of certain real estate in Chicago, on March 10, 1891, together with her husband, Bernhard Behrend, conveyed the same by trust deed to Hermann Felsenthal, trustee, to secure a note of said grantor for \$3000, due five years after date, payable to their own order, and the note became the property of Kaspar G. Schmidt. This trust deed was recorded March 12, 1891, and was the first lien on the premises. On May 2, 1892, said Nora Behrend and husband executed a second trust deed conveying said premises to Peter Popp, trustee, to secure their note for \$3500, payable on or before five years after date, to the order of appellant. This trust deed was recorded June 8, 1892, and was the second lien. On May 9, 1893, Peter Popp, the trustee, executed a release to the Behrends of the trust deed made to him to secure appellant, and this release was recorded August 21, 1893. On December 23, 1893, Johanna Quilty purchased the premises and received a warranty deed therefor from said Nora Behrend and Bernhard Behrend, subject to the encumbrance of \$3000 by the trust deed to Felsenthal, which was the only encumbrance of record. She was furnished with an abstract of title to the premises and caused it to be examined by an attorney, and it showed title in Nora Behrend and that the trust deed to Felsenthal was the only encumbrance. The consideration was \$5600, of which she paid \$2600 in cash, and as the remainder of the consideration she assumed the encumbrance of \$3000. She had no knowledge or notice that complainant's note had not been paid, and she purchased and paid for the premises in good faith, relying upon the public records, which showed the trust deed to Popp, securing appellant, to have been released and discharged

of record four months previously. . The note of appellant was not, in fact, paid or surrendered to the makers. Bernhard Behrend continued to pay interest on the note until January, 1896, and appellant had no actual knowledge of the release until after that time. The note held by Schmidt, secured by the trust deed to Felsenthal, became due March 10, 1896, and Johanna Quilty took up the note, paying \$300 in cash and giving a new note for \$2700, secured by a new trust deed upon the premises to Felsenthal, who thereupon released the first trust deed.

On October 20, 1898, appellant filed her bill in the circuit court of Cook county against said Nora Behrend, Bernhard Behrend and Johanna Quilty and others, to foreclose the trust deed made to secure her. Popp was dead, and Anton Mach, his successor in trust, was made defendant. Johanna Quilty, Felsenthal and the executors of Schmidt, who had died, answered, setting up the facts of the release and purchase and the payment of the first lien above stated. Johanna Quilty died, and her heirs were made parties and are appellees. Said heirs filed their cross-bill, praying to be subrogated to the rights of Schmidt under the first trust deed, which was released upon the payment of \$300 and giving the note and trust deed for \$2700 in renewal. The executors of Schmidt also filed a cross-bill. The cross-bills were answered and the facts were proved to be as before stated, whereupon the circuit court dismissed the original bill at complainant's cost and also sustained demurrers to the cross-bills and dismissed them. Appellant removed the cause by appeal to the Appellate Court for the First District, where the decree was affirmed, and she prosecuted this further appeal to this court.

The release of the trust deed securing the note of appellant, by Popp, the trustee, was unauthorized, for the reason that the note was not paid. The appellant and Johanna Quilty both acted in good faith and were equally innocent, and the question is, who must suffer for the

wrong of the trustee and Bernhard Behrend, who procured the release? The release of the premises without payment of the debt did not discharge the lien as between the original parties, and would not discharge it as to any subsequent purchaser or mortgagee with notice of the breach of trust. The rights of appellant would be superior to any person chargeable with notice that the trust deed was released in violation of its terms. The public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice or is chargeable in some way with notice of some title, conveyance or claim inconsistent therewith. In this case there was no actual notice or knowledge, but Johanna Quilty, the purchaser, acted in entire good faith, and paid her money relying upon the record of the release made on May 9, 1893, and recorded August 21, 1893, showing the payment and the discharge of the lien. Having no such knowledge, she had a right to rely upon the record unless there was something to put a reasonable person upon inquiry whether there was some infirmity in the release. The only ground for claiming that she was affected with notice that the release was fraudulent is the fact that the note of appellant was payable on or before five years after date and five years had not elapsed after its date. Payment of the note could not be enforced against the makers until the expiration of the five years, when it would become due absolutely and at all events. The makers of the note, however, reserved the right to pay it before the end of that period, so that, as far as they were concerned, the note was payable at any time. Presumably, they reserved that right in view of some expectation or probability that they would desire to exercise it. The note being payable at any time at the option of the makers, and the record showing that the payment had been made and the trust deed regularly released, we do

not see how it could be said that Johanna Quilty should either presume or suspect that the makers of the note had not exercised their right and option to pay it. It is to be remembered that Johanna Quilty was a purchaser whose only duty was to ascertain the condition of the title, and she was under no obligation or duty to see that the note was paid or canceled. The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record. There was nothing in this case to give notice to Johanna Quilty that appellant had any lien upon the property, and she was protected by the record. *Ogle v. Turpin*, 102 Ill. 148; *Mann v. Jummel*, 183 id. 523.

It is alleged as error that the trial court admitted in evidence the abstract of title to the premises. It was admitted in connection with the testimony of the attorney who examined it, not to show title but to prove that Johanna Quilty relied upon the record and the written opinion of the attorney as to the state of the title, and it was competent to show good faith on her part.

The only other ruling complained of is that the court excluded testimony of the appellant and held it incompetent as against the heirs of Johanna Quilty. Her counsel asked her only one question, and that was whose property the \$3500 note was. The note was payable to her order and there was no dispute about her ownership. There was no offer to prove anything else by her, and, whether the ruling was right or not, appellant was not harmed by it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOHN B. MALLERS

v.

THE CRANE COMPANY.

Opinion filed June 19, 1901.

CONSTRUCTION—of word “claim,” as used in deed of assignment and bond. The word “claim,” used in a deed assigning certain claims to a creditor to secure an indebtedness and in a bond conditioned that said claims should not be less than the amounts set forth in the deed, must be construed to mean a valid claim for an actual indebtedness, where the language used in the deed and bond in describing each claim is, “claim * * * for money due and to become due shortly for sprinkler equipment and appliances, said claim being not less than” a certain number of dollars.

Mallors v. Crane Co. 92 Ill. App. 514, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES G. NEELY, Judge, presiding.

Appellee brought an action of debt in the circuit court of Cook county against appellant, as surety for the American Fire Extinguisher Company. Judgment was rendered in favor of the plaintiff for \$8404.37 debt, the amount of the bond, and \$7443.49 damages. Motions for new trial and in arrest of judgment were overruled and final judgment entered, to which the defendant excepted and prosecuted an appeal to the Appellate Court. That court affirmed the judgment of the circuit court.

On October 15, 1895, the American Fire Extinguisher Company was indebted to the Crane Company in the sum of \$8404.37, and on that day executed an assignment to it of three claims. The first of these claims is described in the deed of assignment as “a claim against the Standard Wheel Company of Terre Haute, Indiana, for money due and to become due shortly for sprinkler equipment and appliances, said claim being not less than \$1790;” the second as “a claim against the C. Gotzian Company

of St. Paul, Minnesota, for moneys due and to become due shortly for sprinkler equipment and appliances, said claim being not less than \$4916.67;" and the third as "a claim against the David Bradley Manufacturing Company, Bradley City, for moneys due and to become due shortly for sprinkler equipment and appliances, said claim being not less than \$1300." The deed of assignment provides: "And the said American Fire Extinguisher Company, for itself and its assigns, does hereby covenant to the said Crane Company and its assigns that the said American Fire Extinguisher Company is lawfully possessed of the said goods and chattels as of its own property, and that the same are free from all encumbrances, and that they will, and their assigns shall, warrant and defend the same to said Crane Company and its assigns against the lawful claims and demands of all persons."

The bond sued upon is the obligation of said American Fire Extinguisher Company and John B. Mallers, this appellant, to the Crane Company and its assigns, in the penal sum of \$8404.37. The condition of the bond is:

"That whereas, on the 15th day of October, A. D. 1895, the said American Fire Extinguisher Company granted, sold, conveyed and confirmed unto the said Crane Company the following goods and chattels, to-wit:" (then follows a statement of the claims as above stated and set forth in the deed of assignment;) "and whereas, the said Crane Company has agreed, and by these presents does agree and contract with the said American Fire Extinguisher Company, that the said claims so assigned are to be settled, liquidated and collected by the American Fire Extinguisher Company in the ordinary course of its business, as if the said goods and chattels were the property of the said American Fire Extinguisher Company; and whereas, the said American Fire Extinguisher Company has contracted and agreed, and does hereby contract and agree with the Crane Company, to collect the moneys due and to become due upon the said claims and to turn over and deliver to the said Crane Company all moneys and payments collected and received by the American Fire Extinguisher Company upon the account of said claims as rapidly as said payments and moneys are received; and whereas, the said American Fire Ex-

tinguisher Company has agreed and warranted to said Crane Company that the amounts of said claims will not be less than the amounts set forth in the aforesaid bill of sale:

"Now, if it shall appear that the said claims are not less than the amounts so set forth as aforesaid, and if the said American Fire Extinguisher Company shall collect and receive payments and make settlement of said claims in the usual course of business, and shall turn over and deliver to the said Crane Company all moneys so received as rapidly as received, then this obligation is to be void, otherwise to remain in full force and effect.

"Witness our hands and seals, etc.

AMERICAN FIRE EXTINGUISHER CO., [Seal.]

HENRY W. BRACKETT, Gen. Manager.

JOHN B. MALLERS. [Seal.]"

The breaches assigned in the declaration are, that the American Fire Extinguisher Company collected \$1300 from the David Bradley Manufacturing Company and failed to turn it over to the plaintiff; and secondly, that the American Fire Extinguisher Company did not have any claim or demand against the said Standard Wheel Company of Terre Haute, Indiana, or against the C. Gotzian Company of St. Paul, Minnesota.

By his several pleas the defendant denied the execution of the bond, and averred that the same was never delivered or accepted by the plaintiff; that the plaintiff did not permit said extinguisher company to collect said claims, but stopped and prevented the same; that said claims were valid and *bona fide* for the amounts set forth, and that none were collected; that on December 17, 1895, a receiver was appointed for said American Fire Extinguisher Company, who took charge of all of the books and assets of said company and thereby prevented the collection of said claims. These several pleas were traversed by replications and issues joined thereon. A jury was waived by agreement of the parties and both matters of law and fact submitted to the court.

Upon the trial the following questions were put to a witness introduced by the plaintiff: "I will ask you to

state whether or not, on the 15th day of October, 1895, C. Gotzian & Co. was indebted to the American Fire Extinguisher Company in the sum of \$4916.67?"—which was objected to by counsel for the defendant upon the ground that "there is a difference in a claim and indebtedness." "I will ask you how much was disbursed by C. Gotzian & Co. in completing this contract?"—which was objected to as immaterial. The plaintiff also offered in evidence a copy of the account of disbursements made by the Standard Wheel Company on contract with the American Fire Extinguisher Company, which was objected to as immaterial. Each of these objections was overruled and exceptions taken.

Of the propositions of law submitted to the court by the defendant and refused was the sixth, as follows: "The court holds, from the evidence, that the bond in question does not obligate the defendant to the extent that the claims specified in said bond were actually existing obligations of indebtedness due or to become due the American Fire Extinguisher Company, but only that the said company has claims, either actual or which it really and in fact alleged to exist in good faith, as stated in said bond."

CHARLES B. STAFFORD, (JOHN P. WILSON, of counsel,) for appellant.

ASHCRAFT & ASHCRAFT, for appellee.

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

It is insisted as a ground of reversal here that the bond sued on was never delivered and accepted. This was a controverted question of fact at the trial upon which the evidence was conflicting, and is settled adversely to the appellant by the judgment of affirmance in the Appellate Court.

A second ground of reversal insisted upon is, that by its rulings upon the foregoing proposition of law and

the admission of the evidence objected to the trial court erroneously held that "by the word 'claim' the parties meant a valid claim for an actual indebtedness." It may be conceded that the word "claim" generally has a different meaning from the word "indebtedness," but we entertain no doubt that as used in this bond, in connection with the deed of assignment, the parties used it in the sense of an indebtedness due the American Fire Extinguisher Company from the several parties named. Both in the bond and deed of assignment the language is: "The claim of the American Fire Extinguisher Company, etc., for moneys due and to become due shortly for sprinkler equipment and appliances, said claim being not less than \$1790," etc. A claim for money due and to become due for property sold, of not less than a certain amount, fairly construed means a claim of indebtedness due and to become due for the property sold, and by the condition of the bond here sued on it was agreed that it should only be void and of no effect provided it should appear "that the said claims are not less than the amounts so set forth as aforesaid." The purpose of the American Fire Extinguisher Company in assigning the claims to the Crane Company was to satisfy and extinguish an indebtedness due from the former to the latter. To say that the parties intended by the deed of assignment and bond mere claims, and not an existing indebtedness, seems to us unreasonable and to make the whole transaction but an idle ceremony. We think the circuit court properly refused to hold the sixth proposition of law, and that it did not err in admitting the evidence objected to by defendant.

An attempt is made to raise a question of variance between the allegations of the declaration and the proofs, but no such question was properly raised upon the trial and therefore is not open to review here.

We find no reversible error in this record. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE FIRST NATIONAL BANK OF STERLING

v.

JOHN B. DREW.

191	186
198	*401

Opinion filed June 19, 1901.

1. SALES—when seller of “orders” is not liable to buyer for the amount paid. The seller of orders issued to him by drainage commissioners for his services in ditching is not liable to the buyer for the amount paid, where the buyer failed to collect the orders owing to his delay in presenting them until the funds realized from the assessment had been exhausted by payment of other similar orders.

2. SAME—extent of implied warranty on sale of “orders.” The seller of orders issued to him by drainage commissioners for his services impliedly warrants that the instruments are genuine and that he is the owner thereof and authorized to transfer title, but there is no implied warranty that they are issued by authority of law or that they are worth what they represent.

First Nat. Bank v. Drew, 93 Ill. App. 630, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding.

J. E. MCPHERRAN, for appellant:

Where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has the title to the property, and that it is what it purports to be. *Hannum v. Richardson*, 48 Vt. 508.

By the act of transferring it, the assignor engages the instrument is the valid obligation of those whose names are upon it. *Palmer v. Courtney*, 49 N. W. Rep. 754.

In the assignment of an instrument or contract in writing, even not negotiable, for a full and fair price, the assignor impliedly warrants that it is valid and that the maker is liable upon it, unless it clearly appears that the parties intended to the contrary. *Daskam v. Ullman*, 43 N. W. Rep. 321; *Tyler v. Bailey*, 71 Ill. 34; *Lunt v. Wren*, 113 id. 168; *Giffart v. West*, 33 Wis. 617.

C. L. SHELDON, and H. C. WARD, for appellee:

The orders sued on are not negotiable, and therefore no liability was incurred by appellee in signing his name on the back of said orders. *People v. Johnson*, 100 Ill. 545; *Hall v. Jackson County*, 5 Ill. App. 611.

Appellant is not entitled to recover the money paid appellee on account of these orders, either on the theory of an implied warranty in the sale thereof or of failure of consideration. *Otis v. Cullum*, 2 Otto, 447; *Littauer v. Goldman*, 72 N. Y. 506; Tiedeman on Com. Paper, sec. 244, pp. 404, 405; *Hall v. Conder*, 26 L. J. (C. P.) 138; *Lambert v. Heath*, 15 M. & W. 486.

The circuit court found, and the Appellate Court has affirmed such finding, that the orders in question were the valid orders of the district, a prior assessment having been made to meet the same, and that said orders would have been paid if appellant had presented the same in apt time or had presented the same after being notified so to do by appellee, and therefore such failure on the part of appellant constituted a good and valid defense to the orders; and such finding of fact by the Appellate Court is conclusive on this court, and eliminates from the case the attempt of appellant to have this court reconsider or find the facts differently from the Appellate Court. *Mann v. McKiernan*, 110 Ill. 19; *Miller v. Insurance Co.* id. 102; *Insurance Co. v. Sammons*, id. 166; *Mutual Aid Ass. v. Hall*, 118 id. 169; *Insurance Co. v. McKee*, 94 id. 494; *Montgomery v. Black*, 124 id. 57; *Alphin v. Working*, 132 id. 484; *Brewing Co. v. Manion*, 145 id. 182.

MR. JUSTICE HAND delivered the opinion of the court:

This is an action of assumpsit in the circuit court of Whiteside county, brought by the appellant, against the appellee, to recover the amount of three orders issued by Union Drainage District No. 1 of Hume and Prophets-town townships, in said county, to appellee, for work

done in said district, and which orders were purchased by appellant shortly after they were issued. The pleadings consist of the common counts and the general issue, with which was filed a stipulation that any defense might be made which could be proven if specially pleaded. A jury having been waived, upon a trial before the court there was a judgment in favor of the appellee, which has been affirmed by the Appellate Court.

It is first contended that the trial court erred in holding that appellant's right to recover was barred by the Statute of Limitations upon any of said orders which had been transferred to it more than five years prior to the time of the commencement of this suit. Such error, if any, was not prejudicial to the appellant, as only one of said orders was transferred to the appellant more than five years prior to the commencement of the suit, and it was not sold and transferred by the appellee to the appellant and he did not receive anything from the appellant therefor. That order was sold by appellee to one Wait, and by him sold to the appellant. In no event could the appellant recover the amount of that order from the appellee.

It is next contended that the court erred in refusing to hold that by the sale of said orders by appellee to the appellant he impliedly warranted that such orders were valid and issued by authority of law; that said warranty had failed, and that appellant was entitled to recover of appellee the price paid by it to him therefor.

The evidence tended to show that on October 5, 1893, the commissioners of said district levied an assessment for \$5073.75 upon the lands contained in the district, which, according to the estimate of the engineer, was deemed ample to complete the work then contemplated and about to be commenced; that \$2029.50 of said assessment was payable February 1, 1894, and \$3044.25 on February 1, 1895; that subsequent to the levying of said assessment, contracts were let for the work and orders

issued in payment thereof; that the cost of the work, when completed, greatly exceeded the amount of the estimate; that the moneys derived from the assessment of 1893 having been exhausted, to meet the deficiency, on August 31, 1895, a further assessment of \$6531.33 was made, for which amount orders had before that time been issued and were then outstanding. In the year 1898, the orders now in suit not having been paid, the appellant brought an action thereon, against the district, in the circuit court of Whiteside county, and was defeated, which judgment, on appeal to the Appellate Court, was affirmed, (82 Ill. App. 626,) on the ground, as it appears, that the special assessment of 1895 was invalid because it was levied to pay an indebtedness contracted before the assessment was made. The orders in question are in the usual form, are drawn upon the treasurer of the district, are payable to appellee or his order, are signed by the commissioners of the district, and are dated September 1, 1894, for \$172.02, October 13, 1894, for \$492.30, and October 27, 1894, for \$500, and recite upon their face that they are "for services for ditching." Subsequent to the time these orders were issued and were transferred to the appellant, and prior to the bringing of this suit, the assessment for 1893 was collected and paid out by the treasurer of the district upon orders similar to these, issued by the commissioners, and no reason is apparent in this record why these orders would not have been paid had they been presented to the treasurer of said district while he had funds in his hands. The appellee testifies, and he is not contradicted, that on June 22, 1895, he had a conversation with the cashier of the appellant, advised him that there was likely to be trouble about the collection of the assessment of 1895, and urged him to present these orders for payment, and that the cashier said to him, "I don't know what you have got to do with it; you have your money." The evidence tends to show there were ample funds in the hands of the treasurer to have paid these

orders at that time, which was soon thereafter drawn out upon other orders.

We do not think these orders were void, and the Appellate Court did not so hold in the case above referred to. They were issued by the commissioners of said district for a lawful purpose, a legal assessment having been made to pay them, and, so far as we can see, payment was not made solely because the money arising from such assessment was exhausted and there were no funds in the hands of the treasurer with which to pay them at the time they were presented for payment. The fact that they were not presented for payment while there were funds in the hands of the treasurer with which to pay them was not the fault of appellee, and we are unable to see why, as between him and appellant, he should be held liable for the payment thereof.

If, however, it be conceded that the orders were invalid for want of authority in the commissioners to issue the same, still we are of the opinion the appellant can not recover back from the appellee the amount it paid him therefor. The vendor of a chose in action, by its sale and transfer to the vendee and the receipt of the consideration therefor, impliedly warrants that it is genuine and not a forged instrument, and that he is the owner thereof and authorized to transfer the title thereto, subject to these exceptions only: the doctrine of *caveat emptor* applies to the purchaser thereof, and if the vendee desires a further warranty he should exact of the vendor a special guaranty before he pays his money, and not rely upon the warranty raised by implication of law. *Robinson v. McNeill*, 51 Ill. 225; *Tyler v. Bailey*, 71 id. 34; *Strong v. Loeffler*, 85 id. 73; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *White v. Robinson*, 50 Mich. 73; *Littauer v. Goldman*, 72 N. Y. 506; 28 Am. Rep. 171; *Otis v. Cullum*, 92 U. S. 447.

"It is a general rule that one making a sale or transfer of a chose in action warrants its genuineness,—and

this is so whether he warrants it in terms or is silent at the time when the sale or transfer is made. The seller does not, however, undertake that the instrument is worth what it represents, but merely that it is what it purports to be." (15 Am. & Eng. Ency. of Law,—2d ed.—p. 1240.)

In *Robinson v. McNeill*, *supra*, the court say: "The mere transfer of the accounts as unpaid amounted to a warranty that they were so, as Robinson knew whether he had received payment, and would be guilty of a fraud in selling as unpaid a debt which had been actually discharged; but the sale implied no warranty that the accounts were collectible, and unless Robinson expressly warranted they were so, the fact that they were not would be no defense to the note."

In *Tyler v. Bailey*, *supra*, the court say (p. 36): "A person who sells personal property is always understood as warranting the title, and as a general, if not a uniform, rule, a person passing bank bills or commercial paper, or selling a chose in action, is understood and held as guarantor of the genuineness of the instrument,—and this, whether he does so in terms or is silent when the transfer is made. When appellants sold and delivered these land warrants there was an implied warranty that they were genuine, and the law implied an obligation to restore the money to the purchaser when it was ascertained they were counterfeit and an offer was made to return them in a reasonable time."

In *Strong v. Loeffler*, *supra*, it is said: "The assignor of what purports to be a tax certificate does warrant to the assignee that the paper is not a forgery, but there the implication of warranty ceases."

In *People's Bank v. Kurtz*, *supra*, it was held, on a sale of shares of corporate stock, there is no implied warranty that the stock has not been fraudulently issued by the officers in excess of the amount authorized by the charter.

In *White v. Robinson*, *supra*, the plaintiffs sued the defendant, who had sold them several school orders, on the

ground that a portion of them had been issued without authority. On the trial it appeared that they were signed by the parties who purported to sign them. The court say (p. 74): "The papers are not forged, and so far as the record shows there was no bad faith. * * * A sale of genuine documents may involve a warranty of title, but we do not think it involves any warranty that the officers had lawful authority to act in the given case. These papers were valid on their face, as is admitted, and we think, in the absence of any representation or fraud, plaintiffs took them for what they were worth."

In *Littauer v. Goldman*, *supra*, it was held, when the holder of a usurious note transfers the same for value, without endorsement, representation or knowledge of its illegality, he does not impliedly warrant its validity, and no action can be maintained against him by the purchaser to recover damages for the loss or for the purchase money, on the ground of failure of consideration.

The case of *Otis v. Cullum*, *supra*, was an action to recover back the amount paid for certain bonds issued by the city of Topeka under legislative authority, and which were held void on the ground that the legislature had no power to authorize the issue thereof, the basis of the action being a failure of consideration. The court say: "The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and that they are not forgeries. Where there is no express stipulation there is no liability beyond this. If the buyer desires special protection he must take a guaranty. He can dictate its terms and refuse to buy unless it be given. If not taken he cannot occupy the vantage ground upon which it would have placed him."

In this case the orders were genuine, and not forged, and there is no claim of bad faith. We are of the opinion the appellant took them for what they were worth. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

MARTHA SUMMERS *et al.*

v.

HARRIET J. HIGLEY.

191	193
197	317

Opinion filed June 19, 1901.

1. **WILLS**—*provisions of will construed.* A will devising to the testator's wife all of his estate, "to be used by her for her own support and for the maintenance and education of my children," with discretion, as executrix, to bestow sums of money upon the testator's father if he became infirm and dependent, does not pass a fee simple title to the wife but creates a trust, which is not defeated by the fact that the wife is a beneficiary as well as trustee.

2. **TRUSTS**—*when trustee has no authority to mortgage.* A trustee having the power to use the property for her own support and the maintenance and education of the testator's children and the support of his father if he becomes dependent, but having no power conferred by the will to sell or convey, has no authority to mortgage the property to raise money to establish or maintain her second husband in business.

3. **SAME**—*when fee in trust property descends as intestate property.* Where the contingency upon which the fee of trust property should vest in the testator's children never happens and there is no other disposition of the fee provided for in the will, it descends to the testator's heirs-at-law as intestate property when the purposes of the trust have been fulfilled.

WRIT OF ERROR to the Circuit Court of Ogle county;
the Hon. JAMES S. BAUME, Judge, presiding.

In January, 1868, James M. Summers died testate in Ogle county, leaving his widow, Anna M. Summers, and four children, Martha Summers, Laura A. Summers, Edward Summers and William Summers. His will was admitted to probate on the 18th day of February, 1868, and was as follows:

"*In the name of God, Amen.*—I, James M. Summers, of the town of Polo, in the county of Ogle and State of Illinois, of the age of thirty-five years, and being of sound mind and memory, do make, publish and declare this my last will and testament in manner following, that is to say:

"First—I give and bequeath to my beloved wife, Anna M. Summers, all my estate, whether real, personal or mixed, to be used by her for her own support and for the maintenance and education of my children as herein named, to-wit, Laura A. Summers, Edward Summers, Martha A. Summers and William Summers.

"Second—It is my will that my wife, who is hereby constituted my executrix, shall, in her discretion, bestow such sums of money on my father, from time to time, Thomas J. Summers, in case of his becoming so infirm by age or disease that he shall be unable to support himself.

"Third—It is my will that in case of the death of my wife before any of my children above named attain their majority, that whatever of my estate may be left when the youngest child, William Summers, shall have arrived at the age of twenty-one years, and over and above the education and maintenance of my said children, shall be divided equally among them, share and share alike: *Provided, always*, that my said executrix, or a guardian to said children who may hereafter be chosen or appointed, shall have the power to pay to such one as they become of age, such sums as in their discretion my estate shall then enable them to pay.

"Fourth—I hereby appoint my said wife, Anna M. Summers, sole executrix of this my last will and testament, hereby revoking all former wills made.

"In witness whereof I have hereunto set my hand and seal this 24th day of December, A. D. 1867. And I also further will that my said executrix need not give bond for the execution of this my last will and testament."

The widow qualified and has been acting as such executrix ever since.

The testator, at the time of his death, owned, in addition to certain personal property, five lots in Polo, in said county, two of which are in controversy in this case. In 1872 the widow married Martin Grim, who was carrying on the business of a merchant tailor. In 1874, needing

money in said business, he procured a loan of \$650 from the defendant in error, Harriet J. Higley, and with his wife, Anna M., executed and delivered to said Harriet a promissory note for that amount, payable two years after its date, with interest at the rate of ten per cent per annum. To secure the payment of this note said Anna M. Grim, and he, as her husband, gave a mortgage on said two lots,—that is, lots 10 and 11, in block 1, in Waterbury's addition to the town of Polo. The money was not procured or used for any purpose mentioned in the will, but only for the use of Martin Grim in his business. The note not having been paid, the defendant in error, on March 20, 1882, filed her bill of complaint in the Ogle circuit court to foreclose the same. Anna M. and Martin Grim, her husband, and the above named Martha A. Summers, were made defendants. Said Anna M. Grim and said Martha A. Summers answered the bill, admitting the mortgage but denying that it became or was a lien upon the property therein described. Said Martha A. Summers also filed a cross-bill, setting up the will and alleging that her mother, said Anna M., had no legal authority to make said mortgage, and that the same was a cloud on the title of herself and her brothers and sisters to said lots. Issues were made on the bill and cross-bill. The cause was continued many years, until the youngest child reached his majority. The court, on the hearing at the April term, 1900, found there was due on the note \$1755, and that the complainant was entitled to foreclosure, and dismissed the cross-bill and entered a decree of foreclosure and sale as prayed. The said Martha A. Summers and Anna M. Grim then sued out this writ of error to reverse the decree.

FRANCIS BACON, and FRED ZICK, for plaintiffs in error.

J. C. SEYSTER, and JAMES W. ALLABEN, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

By the decree construing the will the chancellor held that "the said Anna M. Grim, upon the death of said James M. Summers, became vested of the title in fee simple in said lands, subject to the conditional limitations that in case of her death before any of the testator's children had attained their majority, then such fee simple would be cut down to a life estate, and the remainder, at her death, would vest in said children," but held also "that all of said children having attained their majority in the lifetime of said Anna M. Grim, the said Anna M. Grim, by virtue of said will, became vested and is now vested with the fee simple absolute in said land, subject to said mortgage." If this is the proper construction of the will, the plaintiff in error Martha A. Summers had no interest in the property and cannot be heard to question the correctness of the decree foreclosing the mortgage. But we cannot so construe the will. It is clear to our minds that by the first provision of the will, which devises the property to the widow, the testator intended to devise, and did devise, the property to her in trust for certain specified uses,—that is, for her own support and for the maintenance and education of their children named in the will. The fact that she is beneficiary as well as trustee does not defeat the trust. (1 Perry on Trusts, sec. 59.) The property is given to her *to be used by her* for those purposes. It seems to us the language is as plain as it would have been had it stated in express terms that the property was given to her in trust, and then had stated the uses to which it was to be devoted.

Section 13 of the act concerning conveyances (Hurd's Stat. 1899, p. 405,) provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by

express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." While the provisions of the will do not contain any words of inheritance, still said Anna would, under the statute, have taken an estate in fee simple absolute in the property afterward mortgaged by her, if it did not appear by the will that a less estate had been devised to her. But it does appear that the property was devised to her upon certain trusts which are declared in the instrument. This is made clearer by the third paragraph of the will, which provides that in case of her death before any one of the children reaches his or her majority, whatever of the estate may remain when the youngest child, William Summers, shall reach twenty-one years of age, over and above the amount consumed in the maintenance and education of said children, is to be equally divided between them. Although the trustee might be dead, the trust would continue until the youngest child should reach his majority, and until that time he would have a beneficial interest in it for his maintenance and education. The will also provided that the property might be further diminished by payments out of it, to each child as he or she became of age, of such sums as the amount of the estate would, in the discretion of the one then appointed to execute the trust, enable him to make. But this makes it clearer that the testator intended that eventually the property should go to his children.

We are of the opinion, also, that a trust is declared by the second paragraph in favor of Thomas J. Summers, the father of the testator. By this provision the testator declares, in effect, that it is his will that his wife shall bestow upon his father, from time to time, in case of his becoming so infirm by age or disease as to be unable to support himself, such sums of money as in her discretion she shall deem necessary for his support.

Such are the trusts declared by the will, and the property is to be used to carry them into effect. It is to be

noted that no power of sale is given to the trustee nor power to mortgage the property for any purpose, and while, if it became necessary, in carrying out the provisions of the will, to sell the real estate, a court of equity would have the power to authorize the trustee to sell and convey the fee, we are of the opinion the will conferred no power on the trustee to sell or to convey, by deed or mortgage. She was authorized to use the property for the purposes mentioned,—not to sell or mortgage it. She could reside upon it with her children, or rent it, or make any proper use of it. To mortgage it to raise money to establish or maintain her husband, Grim, in business, was wholly unauthorized, and the mortgage was without force, and should have been so declared.

The contingency upon which the property was to be equally divided among the children when the youngest child should reach his majority, as provided in the third clause, never happened and cannot happen hereafter, inasmuch as that period has passed and the said Anna M. Grim is still alive. There is no other provision in the will disposing of the property, or what may be left of it after the termination of the trust. The fee not having been devised except for the purposes of the trust, we are of the opinion that it descended to the testator's heirs-at-law as intestate estate, subject to the trust, in the same manner it would have done had there been no will, and said James M. Summers had by deed conveyed the property to his wife in trust for the same uses. It is probable, from the terms of the will, that the testator believed that the complete execution and satisfaction of the trusts created would consume the estate. But be that as it may, it remains true that the fee was not otherwise devised than in trust for the uses mentioned.

It follows that Anna M. Grim had no title which she could convey, by mortgage or otherwise, for the benefit of her husband, Martin Grim, and that the court below erred in decreeing a foreclosure of the mortgage. The

struct the jury to find the defendant not guilty. Counsel for appellant have argued this branch of the case at great length and have fully reviewed the evidence. We have carefully read the evidence, and it is clear to us that while it was conflicting there was evidence before the jury fairly tending to prove the cause of action alleged in the declaration. Its probative force was a question for the jury and the trial court, and finally for the Appellate Court.

At the instance of the plaintiff the court gave to the jury this instruction:

"The jury are not necessarily bound to believe anything to be a fact because a witness has stated it to be so, provided the jury believe, from the evidence, that such witness is mistaken or has sworn falsely as to such fact."

The point made against the instruction is, that it failed to state correctly the rule by which the jury should have been governed in determining the credit to be given to the different witnesses who testified in the case. We do not understand from this instruction that its object was to state the well known rule on this subject at all. The instruction could not have been of much importance in the case, for it would not be at all probable that jurors would believe any particular thing testified to by a witness as a fact to be a fact, which, from all the evidence before them, they believed was not a fact. It was limited to a particular fact in the case, and did not extend to or bear upon the rule by which the credibility of witnesses should be determined.

Other criticisms are made on the rulings of the court respecting other instructions, which we have considered but find not to be of sufficient importance to require comment here.

Finding no error in the record the judgment will be affirmed.

Judgment affirmed.

DANIEL H. TOLMAN

v.

JULIUS S. SALOMON *et al.**Opinion filed June 19, 1901.*

1. **TAXES**—*tax-payer is entitled to notice of a re-assessment.* If a tax-payer makes out and delivers to the assessor a list of his taxable property, with the valuation thereof, *and such schedule and valuation are accepted by the assessor as correct*, they cannot afterward be altered or changed without notice to the tax-payer.

2. **SAME**—*assessor is not bound to accept tax-payer's valuation of property.* The assessor is not bound to accept the tax-payer's valuation of his property as correct, and if he does not accept it he is not required to give notice to the tax-payer of changes in valuation.

APPEAL from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

COX, HELDMAN & SHORTLE, for appellant.

JULIUS A. JOHNSON, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant filed his bill in the superior court of Cook county against appellees, the tax collectors of the towns of North Chicago and South Chicago, and Samuel B. Raymond, county treasurer of Cook county, praying for an injunction against the collection of taxes claimed to be due from appellant on his personal property in said towns for the year 1900. Appellees filed a general demurrer to the bill, and in open court waived all objections and causes of demurrer because of misjoinder of defendants, and submitted the demurrer upon the single question whether the bill stated equitable grounds for the relief prayed for. The court sustained the demurrer, and appellant standing by his bill, it was dismissed for want of equity.

The material facts stated in the bill and admitted by the demurrer are, that complainant, who resides in the town of North Chicago and has his office in the town of South Chicago, on April 16, 1900, made, signed and swore to a schedule of his personal property located in the town of North Chicago and a like schedule of his property located in the town of South Chicago. These schedules contained a complete statement of the personal property owned by him on April 1, 1900, in said towns, respectively, and in said schedules he gave a full fair cash value of the articles therein mentioned, as provided by the statute. The value of the property in the town of North Chicago, as stated by complainant, was \$600, and of the property in the town of South Chicago \$500. On said day he delivered the schedules to the board of assessors of Cook county, and the board afterward met on the third Monday of June, 1900, for the purpose of revising the assessments of personal property, and placed the value of complainant's property in the town of North Chicago at \$20,000 and in the town of South Chicago at \$5000, increasing the valuation above that given by complainant. No notice of this act was given to complainant, and he never knew that the valuation of his property had been increased above that given by him until the months of December, 1900, and January, 1901,—too late to apply to the board of review.

The law creates a board of assessors for counties of the population of Cook, and the board has the powers and is required to perform the duties of township assessors under the law. By section 17 of the act for the assessment of property the assessor is required to furnish to each person a printed blank schedule for his property, with a printed notice that the schedule must be filled out, sworn to and returned, and that such person is to give the full fair cash value of the articles mentioned in the schedule. Complainant complied with the notice and made return of his property with his estimate of the fair

cash value thereof. It has constantly been held that where a property owner so makes out and delivers to the assessor a list of his taxable property with the valuation thereof, and the schedule and valuation are accepted by the assessor as correct, they cannot afterward be altered or changed without first giving notice to the party assessed. (*Cleghorn v. Postelwaite*, 43 Ill. 428; *McConkey v. Smith*, 73 id. 313; *First Nat. Bank of Shawneetown v. Cook*, 77 id. 622; *Camp v. Simpson*, 118 id. 224; *Huling v. Ehrich*, 183 id. 315; *Ayers v. Widmayer*, 188 id. 121.) There can be nothing in the nature of a re-assessment without notice to the party affected. There is some argument about changes in the statute at different times, but the rule would be the same under any statute. Every property owner has a right to a hearing in such a case, and an assessor can not secretly re-assess such owner without giving him an opportunity to contest the justice of the change. (*Cooley on Taxation*, 266; *Desty on Taxation*, 596.) That rule is founded on the plainest principles of justice and is enforced by the guaranties of the constitution. The bill, however, in this case does not raise any question of re-assessment or an increase of assessment, and does not show that the valuations fixed by the complainant were ever accepted by any assessor or deputy or the board of assessors. A property owner has the right to give his estimate of the value of his property, but the law requires that the assessor shall thereupon assess the value of such property and enter the valuation in his books. The assessor is to determine and fix the fair cash value of all items of personal property. If he accepts and adopts the valuation of the property owner he cannot change it without notice to such owner; but, so far as appears, there was but one assessment, and complainant's valuation was never accepted, and there was no increase or modification of the value first fixed under the statute. The court was right in sustaining the demurrer.

The decree is affirmed.

Decree affirmed.

CHARRIE A. BACON *et al.*

v.

THE NATIONAL GERMAN-AMERICAN BANK of ST. PAUL.

Opinion filed June 19, 1901.

1. MORTGAGES—*an indebtedness to be secured is essential to the existence of a mortgage.* It is essential to the existence of a mortgage that there be some indebtedness to be secured thereby, or some obligation to pay money or perform some act or duty.

2. SAME—*what tends to show that deed was not intended as a mortgage.* Evidence that the grantee in a quit-claim deed refused to take a mortgage upon the property when approached upon the subject, tends to show that the quit-claim deed to him and his agreement to re-sell were not intended by him merely as a mortgage.

APPEAL from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

The appellee, the National German-American Bank of St. Paul, Minnesota, claiming title in fee simple to a certain 96½ acre tract of land in Cook county, derived through *mesne* conveyances from the United States government, filed its bill, making the appellants, Charrie A. Bacon and others, parties thereto, to establish its title under the Burnt Records act. Appellants appeared and answered the petition, alleging that they are the equitable owners of the premises,—the appellants Charrie A. Bacon and Sarah L. Rogers as tenants in common of the east half thereof, and appellants Joseph K. Bacon and Charles P. Coleman as tenants in common of the west half thereof,—and claiming that the interest of the petitioner therein is that of mortgagee, only.

The relations of the various parties to the premises are as follows: In 1889 Frank K. Bacon purchased the property from William C. Goudy, executor of the estate of Lavinia C. Fuller, for \$35,000, and gave a purchase money mortgage for \$26,250 to said Goudy, covering the whole of the premises. In November, 1889, Charrie A.

Bacon and Sarah L. Rogers, appellants herein, by *mesne* conveyances had become the owners of the east half, and Joseph K. Bacon and Charles P. Coleman, appellants, had become the owners of the west half of the premises. In 1892 Joseph K. Bacon and Charles P. Coleman gave a mortgage to appellee on their west half of the land to secure their note of \$20,000, this second mortgage being subject to the Goudy mortgage on the whole premises. In 1894 proceedings were commenced by the administrator *de bonis non* of the estate of Lavinia C. Fuller to foreclose the Goudy mortgage. Appellee, as holder of the second mortgage on a portion of the premises, was made a party to the foreclosure proceeding, and in 1895, after certain negotiations, conducted on the one hand by George V. Bacon in behalf of his wife, Charrie A. Bacon, and of Sarah L. Rogers, and on behalf of the bank by James W. Lusk, president thereof, Mr. Lusk, in his own name but as agent for appellee, purchased the Goudy mortgage for \$25,000. Afterward, in November, 1895, pursuant to the negotiations with Mr. Lusk, appellants Charrie A. Bacon and Sarah L. Rogers conveyed all their interests in the land by quit-claim deeds to James W. Lusk. At that time and as part of that transaction Lusk executed and delivered to Charrie A. Bacon and Sarah L. Rogers an agreement, which provided that they might purchase from him the east half of the tract upon payment to him, on or before the time limited therein, one-half of all that it had cost him to obtain title to the whole tract,—which included one-half of the amount paid for the Goudy mortgage and one-half of the expense incurred in relation thereto,—and one-half of all money that might be paid out on account of the premises between the date of the contract and the date when appellants should exercise their option, together with ten per cent interest thereon. About eleven months later this agreement was canceled and a new one made, which contained the additional requirement that these appellants should pay to the ap-

pellee bank a note of \$700 signed by George V. Bacon and Charrie A. Bacon. At about the same time of the delivery of the deeds by Charrie A. Bacon and Sarah L. Rogers, the appellants Joseph K. Bacon and Charles P. Coleman also made and delivered quit-claim deeds of their west half of the land in controversy to Lusk. As part of that transaction Lusk surrendered their second mortgage note to them and canceled the indebtedness, and gave to them an option contract similar to the one given to the other two appellants, except that in case they elected to purchase they should pay \$10,000 in addition to one-half of the amount it had cost the appellee to secure title to the premises, together with eight per cent interest thereon. After the purchase of the Goudy mortgage by Lusk the foreclosure proceedings were continued, and the premises were bought in by Lusk, for appellee, at the master's sale under the foreclosure decree, and the certificate of purchase was issued to him in January, 1896. The option contracts were from time to time extended, and finally expired July 1, 1899. Shortly before the time finally limited, the contracts were filed for record in Cook county. The defendants insisted by their answers that these contracts and said quit-claim deeds amounted to mortgages.

The cause was referred to the master. Evidence was heard by him upon the issues raised, and his conclusion that the deeds and option contracts did not constitute mortgages was reported to and confirmed by the circuit court, a decree being entered thereon in accordance with the prayer of the petition. From that decree appellants now prosecute this appeal, contending the quit-claim deeds to Lusk, though absolute in form, were intended to be mortgages, merely; that the deeds and contracts executed by Lusk to appellants were parts of one and the same transaction, and amount, in equity, to mortgages of the lands in controversy.

BROUGHAM & EDGERTON, for appellants.

HENRY A. GARDNER, and HENRY L. STERN, for appellee.

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

The only question presented by this appeal is, do the transactions referred to in the foregoing statement of the case amount only to mortgages, or were they conditional sales, subject to be defeated in case appellants should exercise the privilege of re-purchase granted by the option contracts?

The cause was heard by the master, and his conclusions of fact were in favor of the contention of the appellee, and the circuit court, after a hearing on exceptions to his report, approved those conclusions. We have carefully examined the record, and think the conclusions of the master and chancellor are correct and fully authorized by the weight of the evidence.

It appears from the testimony of George V. Bacon, husband of appellant Charrie A. Bacon, who acted for his wife and Sarah L. Rogers in the negotiations with Mr. Lusk looking to the taking up of the Goudy mortgage by the latter, that he (Bacon) asked that the bank take a mortgage on the east half of the land to secure the payment to it of one-half of the amount necessary to buy the first mortgage. This the bank declined to do, but insisted that quit-claim deeds be given. This would seem to clearly indicate, according to appellants' own evidence, that the bank did not intend the transaction should be considered as a mortgage, merely. Again, the bank, being the holder of a second mortgage on the west half of the property, might well desire to protect itself by buying in the first mortgage, but except for the purpose of protecting such second mortgage and curing any possible defect in the foreclosure of the first or Goudy mortgage there was no substantial reason why it should desire the quit-claim deeds. There were reasons, how-

ever, why the appellants should be willing to give the deeds and receive an option to re-purchase. At that time the Goudy mortgage was in process of foreclosure. In order to redeem from a foreclosure sale the owners of either half of the property would have to pay the full amount of the foreclosure decree, which amounted to about \$32,000, whereas by giving the deeds and taking the options to re-purchase, the owners of either half would have to pay less than one-half of the amount necessary to redeem their half, and under the original contract obtained a longer time to re-purchase than the law would give them to redeem.

There is another aspect of the case which is conclusive against the contention of appellants. At the time of the giving of the quit-claim deeds, Charrie A. Bacon and Sarah L. Rogers were not indebted to appellee, nor did they become indebted to it, nor did they make any agreement to pay to it a single dollar. Appellee had no pecuniary claims whatever against either of them. Joseph K. Bacon and Charles P. Coleman were indebted to the bank in the sum of \$20,000, but that indebtedness was canceled when the quit-claim deeds were given to Lusk by them, so that there was no indebtedness from either of them upon which to base a mortgage. It is well settled that it is essential to the creation and existence of a mortgage that there be some indebtedness to be secured thereby, or some obligation to pay money or perform some act or duty. When the debt is extinguished the mortgage becomes null and void. *Rue v. Dole*, 107 Ill. 275; *Burgett v. Osborne*, 172 id. 227.

We are clearly of the opinion that the court below committed no error in its decree in favor of appellee's contention, and it will accordingly be affirmed.

Decree affirmed.

HENRY H. GAGE

v.

THE CITY OF CHICAGO.

Opinion filed June 19, 1901.

1. SPECIAL ASSESSMENTS—*when sewer ordinance is void for failure of description.* An ordinance for a sewer is void which fixes the starting point of such sewer at the connection with another sewer in a certain cross-street, whereas it appears from the ordinance itself that the sewer on such cross-street stops at a point a block away from the point of connection specified.

2. SAME—*city cannot arbitrarily provide for putting in house connection slants.* A city has no power to provide that "house connection slants" be placed on both sides of a sewer opposite each twenty feet of lot frontage, where the property affected is divided into lots having a greater frontage than twenty feet.

WRIT OF ERROR to the County Court of Cook county;
the Hon. FRANK SCALES, Judge, presiding.

This is a special assessment proceeding to pay the cost of a connected system of sewers in the city of Chicago. The ordinance, providing for such connected system of sewers, was passed by the city council on November 2, 1891. Petition was filed in the county court of Cook county on November 25, 1891, to which was attached a certified copy of the ordinance, alleging that the commissioners, appointed by the common council to make an estimate of the cost of the improvement contemplated by the ordinance, theretofore on November 9, 1891, made a report to the council, (which was afterwards approved by it), estimating the cost at \$14,406.65, the copy of the report being annexed to the petition and made a part thereof. The petition prayed for an assessment of the cost of the improvement in the manner prescribed by law. An order was made by the court on November 25, 1891, appointing commissioners to make the assessment. The assessment roll was filed on January 28, 1892. On February 8, 1892, the plaintiff in error entered his appearance,

and filed his objections to the confirmation of the special assessment. On May 27, 1892, hearing upon the objections of the plaintiff in error was passed, and it was ordered that the cause proceed, and a jury come. On May 28, 1892, the jury returned their verdict, finding the issues for the petitioner, the city of Chicago, and that the property of the objector was not assessed more or less than it would be benefited by the improvement, nor more or less than its proportionate share of the cost of the improvement. On June 1, 1892, the cause came on to be heard on the assessment roll, and the objections thereto; and, by agreement, a trial by jury was waived, and the cause was submitted to the court for trial without a jury; and the court overruled said objections, and, thereupon, on motion of the attorney of the city of Chicago, it was ordered and adjudged by the court that said assessment and all proceedings therein be and the same were thereby confirmed, and that the clerk of the court certify the same, together with the judgment, to the city collector, as required by law. Afterwards, on March 28, 1899, a judgment was entered by the court, by the terms of which, after reciting that no judgment had ever been entered upon said verdict, it was, upon motion of the petitioner, further adjudged and decreed that judgment of confirmation be, and was, thereby entered upon said verdict, confirming said assessment roll as to all such objections; and it was further thereby ordered that the clerk of the court certify the judgment to the city collector for collection according to law.

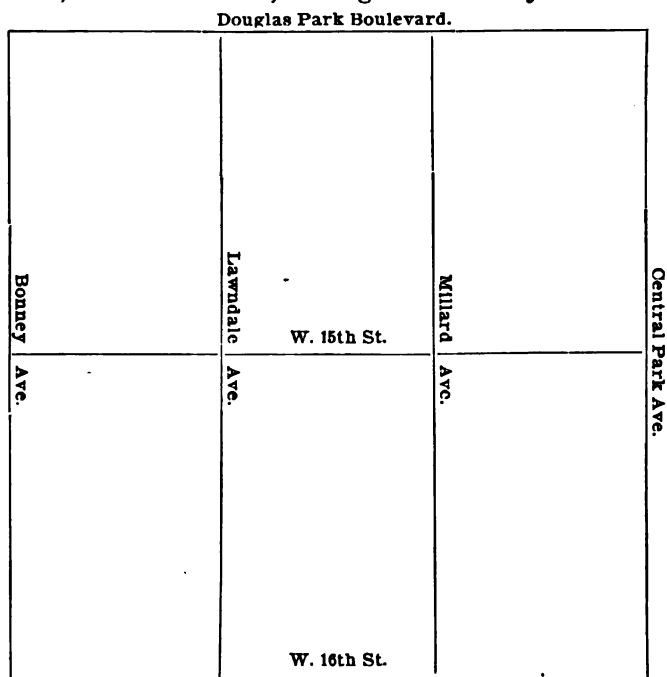
The present writ of error is sued out for the purpose of reviewing the said judgment.

F. W. BECKER, for plaintiff in error.

CHARLES M. WALKER, Corporation Counsel, ROBERT REDFIELD, and WILLIAM M. PINDELL, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Among the objections, made to the confirmation of the assessment by plaintiff in error in the county court, was the objection that the ordinance, lying at the basis of the assessment, was void for uncertainty. The following diagram shows the situation and aspect of the proposed sewers, and the streets, through which they were to run:



Section 1 of the ordinance provides, "that a connected system of vitrified tile-pipe sewers be constructed as follows, to-wit: In West Sixteenth street along the center line thereof from and connecting with the sewer in Central Park avenue to the west line of Lawndale avenue; in West Fifteenth street along the center line thereof from and connecting with the sewer in Central Park avenue to the west line of Bonney avenue; in Douglas Park boulevard along a line thirty feet north of and parallel

with the south line thereof from and connecting with the sewer in Central Park avenue to the center line of Bonney avenue; and in Millard avenue, Lawndale avenue and Bonney avenue along the center line thereof from their connections with said sewer in West Sixteenth street to their connection with said sewer in West Fifteenth street, and thence to their connection with said sewer in the south side of Douglas Park boulevard."

The streets, running north and south, are Central Park, Millard, Lawndale and Bonney avenues; and the streets, running east and west, are Douglas Park boulevard, West Fifteenth and West Sixteenth streets. The sewer in West Sixteenth street is, by the terms of the ordinance, to run west to Lawndale avenue only, while the sewers in West Fifteenth street and Douglas Park boulevard run west to Bonney avenue, which is a block farther west than Lawndale avenue. As the West Sixteenth street sewer runs only to Lawndale avenue, it is apparent that between Lawndale and Bonney avenues there is a hiatus and no sewer. Hence, a sewer in Bonney avenue could not connect with the sewer in West Sixteenth street. The reference in the ordinance could not be to any existing sewer in West Sixteenth street between Lawndale and Bonney avenues, nor to any sewer to be thereafter constructed in West Sixteenth street between Lawndale and Bonney avenues, because the ordinance specifies that the sewers shall be constructed in Millard, Lawndale and Bonney avenues along the center line thereof "from their connections with said sewer in West Sixteenth street." The words "said sewer" can refer to nothing else than the provision theretofore made in the ordinance for a sewer in West Sixteenth street from Central Park avenue to Lawndale avenue. Therefore, the sewer referred to in the ordinance is only the sewer extending in West Sixteenth street from Central Park avenue to Lawndale avenue, and not any sewer in West Sixteenth street extending from Lawndale avenue

to Bonney avenue. It follows, that the sewer in Bonney avenue could not connect with the sewer in West Sixteenth street. In view of this uncertainty we are of the opinion, that the ordinance was void. (*City of Alton v. Middleton's Heirs*, 158 Ill. 442). As the Bonney avenue sewer has no connection with the West Sixteenth street sewer, its point of commencement in West Sixteenth street is not designated. Its starting point being an unknown quantity, neither its length nor depth can be known, and no intelligent bid could be made for that part of the work.

As the sewer running south in Bonney avenue would have no connection with any sewer in West Sixteenth street, its outflow would make a cesspool of private property. The city would have no right to empty the sewage upon private property. (*Nevins v. City of Peoria*, 41 Ill. 502). The ordinance makes no provision for the outflow.

In addition to what is said above, the ordinance provides for "house connection slants of six-inch internal diameter to be placed on both sides of the sewer opposite each twenty feet of lot frontage." It sufficiently appears from the assessment roll, that the lots of the plaintiff in error have a frontage of about fifty feet, certainly of more than twenty feet. The arbitrary subdivision of such lots into subdivisions of twenty-feet lots necessarily increases the expense of the improvement, and casts a burden upon the property in excess of the benefit received, and is beyond the power of the council. We have held in a number of cases, that the city has no power to dictate to a land owner how he shall subdivide his land, and lots of a greater frontage than twenty feet cannot be subdivided by the city into lots, each having a frontage of twenty feet, for the purpose of being assessed. (*Bickerdike v. City of Chicago*, 185 Ill. 280, and cases therein referred to).

For the reasons above stated, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

DENNIS O'CONNELL

v.

MARTIN A. O'CONOR.

191	215
211	587

Opinion filed June 19, 1901.

1. **EQUITY**—*ground of jurisdiction of chancery to decree cancellation of deed.* The jurisdiction of chancery to decree the cancellation of a deed rests upon the ground that it is against conscience for the party holding the deed to retain it or attempt to enforce it against the complainant, and hence applications to cancel deeds are subject to the maxim "he who seeks equity must do equity."

2. **SAME**—*when deed should not be canceled without requiring complainant to refund consideration.* Where the deed sought to be canceled is the outgrowth of a mortgage which complainant, by his representations, procured to be accepted as constituting a valid lien upon the true title to the property, thereby inducing the mortgagee to accept the mortgagor's note and surrender up a valid obligation of the complainant for part of the amount, relief should not be granted at the instance of complainant except upon condition that he pay the defendant the sum of money intended to be secured by the mortgage, with interest from the date thereof.

APPEAL from the Circuit Court of LaSalle county;
the Hon. CHARLES BLANCHARD, Judge, presiding.

JAMES J. CONWAY, and BREWER & STRAWN, for appellant.

DUNCAN & DOYLE, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery exhibited in the circuit court of LaSalle county by the appellee, Martin O'Conor, against the appellant and against other persons who are not parties to this appeal. The bill alleged that the complainant, Martin A. O'Conor, (appellee here,) stood seized of the title in fee to lot No. 6, block 116, in the city of LaSalle; that the appellant had caused to be recorded a deed from the master in chancery of said LaSalle county, purporting to convey to him (the appellant) the said lot in pursuance of a sale made under a decree of foreclosure

entered in the LaSalle circuit court, but that said master's deed conveyed no title whatever and was a cloud on appellee's title. The bill prayed for a decree canceling said master's deed as a cloud on the title of the appellee. The parties to the bill other than the appellant were defaulted. He filed an answer, and on a hearing a decree was entered in accordance with the prayer of the bill, and appellant has perfected this appeal to bring the decree in review in this court.

The decree appealed from recites as the finding of fact relative to the title of the appellee, (complainant below,) that one Ellen O'Connor (mother of appellee) entered into actual possession of the lot in question in July, 1874, under the claim that she was the owner thereof, and continued in the open, adverse, notorious, exclusive and continuous possession thereof for a period of more than twenty years, and thereby became the owner of the title to the lot in fee simple, and after the expiration of said period conveyed the lot to the appellee and delivered to him the possession thereof.

Ellen O'Connor, whose possession of the said lot is relied on to establish the title of appellee thereto, was the wife of Michael O'Connor, now deceased. In 1874 (the date of the beginning of the alleged period of twenty years' possession aforesaid) the family consisted of the husband, Michael O'Connor, the wife, said Ellen O'Connor, and three sons and a daughter, namely, Martin, (the appellee,) Thomas, Patrick J. and Mary Ann (now Keegan). The family had previously lived on a farm near LaSalle, and in 1874 a house was built on the lot, which was occupied by the family as a residence. Michael O'Connor lived there with his wife and their children, including the appellee, until his death, which occurred in 1885. The position of the appellee is, the lot was vacant and unoccupied in 1874, and that the wife then took possession of it, had the dwelling house built upon it out of her own means, and that though the husband, wife and their sons and

daughter resided in the property, the possession and control of the property were exclusively in the wife and that she claimed to be the owner thereof.

In 1868, some six years prior to the construction of the house on the lot, one Appleton R. Hillyer obtained a tax deed for the lot. Whether he had other claim of title does not appear. In 1880 Hillyer conveyed such title or interest as he had to Mary A. O'Connor, (now Keegan,) a daughter of said Ellen O'Connor, and who then resided with said Michael and Ellen, her father and mother, in the family home on the lot. Mary A. held the title so acquired until 1882, when she conveyed it to Patrick J. O'Connor, her brother, an unmarried man of mature years, who also resided in the home with his father, Michael, and his mother, said Ellen, and his brothers, the appellee and said Thomas. In May, 1884, Patrick J. mortgaged the lot to one John O'Connell, Sr., father of the appellant, to secure a note in the sum of \$250, and in October, 1884, Patrick J., who still resided in the same house with his father and mother and the appellee, on said lot, executed a deed to said Ellen O'Connor, his mother, purporting to convey the title to her. This deed contained a condition hereinafter set forth. The mortgage to said John O'Connell, Sr., father of appellant, and the deed to said Ellen O'Connor, were duly recorded in order as they bore date, respectively. A decree of foreclosure, to which said Patrick J. and said Ellen O'Connor were parties, was entered on this mortgage in the circuit court of LaSalle county, and the appellant, Dennis O'Connell, purchased the lot at the sale made by the master in chancery in pursuance of the decree, and in default of redemption received a deed for the lot from the master. The decree in the case at bar now brought under consideration by this appeal orders this master's deed be canceled of record and that it be for naught esteemed.

When the mortgage was executed by Patrick J. O'Connor to John O'Connell, Sr., now deceased, the only paper

title to the lot, so far as this record discloses, was in Patrick J. He lived in the house on the lot, a member of a family composed of his father, his mother, (the said Ellen O'Connor,) his brother Martin, (the appellee,) and Thomas, another brother,—the sister, Mary A., having intermarried with one John C. Keegan and removed to the home of her husband. Thomas O'Connor was involved in trouble of a criminal character, the exact nature whereof is not clearly made known. He had been confined in jail under the charge against him, had recovered his liberty, but feared further prosecution under an indictment against him, and it was necessary to secure money to assist him. Dennis O'Connell, the appellant, and John O'Connell, sons of John O'Connell, Sr., testified that said Thomas O'Connor and the appellee, Martin A. O'Connor, came to the home of John O'Connell, Sr., their father, to induce said John O'Connell, Sr., to loan \$200, to be used in the defense of the criminal charge against Thomas; that said John O'Connell, Sr., then held a note for \$50 signed by the appellee, Martin A., and his brother Thomas; that John O'Connell, Sr., said to Martin A., the appellee, and to Thomas O'Connor, that he would loan the money they sought to get, (\$200,) provided security, by way of a mortgage on the property here in question, was given to secure the re-payment of the money and also to secure the payment of the \$50 note which John O'Connell, Sr., then held against said appellee, Martin A. O'Connor, and his brother Thomas; that appellee, Martin, and said Thomas, expressed themselves as satisfied with this arrangement, and that Thomas, in the presence of the appellee, Martin, said his brother Patrick J. owned the house and lot and would sign the note and mortgage,—that Patrick's title was good, etc.; that Martin, the appellee, agreed that the \$50 note, on which he was one of the payees, should be also secured by the mortgage, and also said that his brother Patrick J. was "the right owner of the lot;" that afterwards, in pursu-

ance of the understanding arrived at by and between the appellee, his brother Thomas and said John O'Connell, Sr., said Patrick J. executed a note for \$250 and a mortgage on the premises here involved to secure it, and delivered the same to said John O'Connell, Sr., who surrendered the note of \$50, on which the appellee was one of the payees, and paid said Patrick J. \$200 in money.

The appellee admitted, when testifying as a witness, that he knew of the execution of the mortgage by Patrick at the time of the transaction. When asked if he did not go to John O'Connell, Sr., and assist in arranging for the loan of the money for which the mortgage was in part given, he would only reply that he could not remember, and he made the same reply when asked if he had not signed the \$50 note to John O'Connell, Sr. He admitted he heard his brother Patrick tell John O'Connell, Sr., that the title to the lot would be in him (Patrick) when his mother (Ellen O'Conor) died. In reply to another interrogatory appellee admitted that he saw said John O'Connell, Sr., as he was going to Peru, where the mortgage was afterward executed by Patrick, and told him that Patrick would own the lot when his mother, Ellen, died, but appellee added, "I made use of that expression, but I did not bind myself in any way about the matter." When asked if the note for \$50 before mentioned was not included in the mortgage, his reply was that he did not know as to that. Aside from the testimony given by the appellee, that of the appellant and his brother John was all the evidence relating to matter of the representations of the appellee to said John O'Connell, Sr., with reference to the title of Patrick to the lot.

In October, 1884, (after the execution of the mortgage to said John O'Connell, Sr., in May of the same year,) said Patrick J. O'Conor executed a deed conveying said lot to said Ellen, his mother. Both grantor and grantee then still resided in the same dwelling on the lot, and were members of the same family. The deed contained

the following statement: "The consideration of this deed is, that Ellen O'Connor, to whom this property is now deeded, is the mother of Patrick O'Connor, bachelor. To his mother, Ellen O'Connor, he deeds the above described property during her life, to revert to him at her death, a homestead for Mrs. Ellen O'Connor being the consideration." This deed was filed for record April 18, 1885.

At the June term, 1886, of the circuit court of LaSalle county, a decree was entered foreclosing the mortgage given by said Patrick J. O'Connor to said John O'Connell, Sr. The defendants to the proceeding were Patrick J. and his mother, Ellen. Both were personally served with process, and Ellen, the mother, filed an answer. The following extracts from the decree show the portions thereof material for the purposes of this investigation: "And the court further finds from said bill, and from the answer of Ellen O'Connor thereto, and from oral evidence, etc., that the allegations contained in said bill against said defendant, Patrick J. O'Connor, are true as therein stated, and as against the said defendant, Patrick J. O'Connor, the equities of this cause are with the complainant, and that there is now due the complainant, for principal and interest upon said note, the sum of \$292.61 from said Patrick J. O'Connor; that to secure the sum of \$250 due said complainant, on May 1, 1884, Patrick J. O'Connor executed his certain promissory note for that amount, payable in one year, at eight per cent interest, and to secure the payment of said note said Patrick J. O'Connor conveyed by deed of mortgage to said complainant whatever interest he possessed in lot 6, in block 116, LaSalle; that afterwards Patrick J. O'Connor conveyed said premises by quit-claim deed to Ellen O'Connor, and that whatever interest said Ellen O'Connor has received by virtue of said deed is subject to the rights of complainant under and by virtue of said mortgage. The court further finds that Ellen O'Connor, defendant, is entitled to a homestead interest in said premises. The court further finds

that said Ellen O'Connor took possession of said lot 6 as one of the heirs-at-law of Martin O'Connor, deceased, in the year 1874, and made all the improvements with her own money that were ever made on said premises, and that she has been continually in possession of the same until the present time, and occupied as her only homestead since she took possession as aforesaid. The court therefore orders, adjudges and decrees that said defendant, Patrick J. O'Connor, pay to the complainant within thirty days the sum of \$292.61, with interest and costs of suit, and in default thereof the master in chancery of this court shall sell said interest in said lot 6, block 116, belonging to said Patrick J. O'Connor at the time of the execution of said mortgage, as well as whatever interest the said defendant, Ellen O'Connor, may have acquired in or to said premises by, through or under Patrick J. O'Connor since the execution of said mortgage to said complainant. Said sale of said lot shall be made subject to the right of homestead interest therein in favor of said defendant, Ellen O'Connor, and subject also to whatever interest, if any, said Ellen O'Connor has in said premises as one of the heirs of Martin O'Connor, deceased."

The appellant, Dennis O'Connell, as before said, purchased at the sale made by the master under this decree, and no redemption having been made, obtained a master's deed, being the deed ordered to be canceled by the decree in the case at bar.

Ellen O'Connor was a proper party defendant to this foreclosure proceeding. She held a deed from Patrick J. for the premises, and claimed other rights and interests in the premises not connected with the title acquired from Patrick. Such title or interest as she acquired through the conveyance from Patrick was subordinate to the lien of the mortgage, and this the court had full power to adjudicate in the foreclosure proceeding and declare in the decree. The court, however, found that said Ellen had some claim to or interest in the lot which was adverse

to the title to which the lien of the mortgage attached, and assumed to declare, though in an indefinite and unintelligible manner, the extent and character of such adverse claim or interest. But such interest, claim or title as said Ellen had or claimed to have otherwise than through her grantor, Patrick, so far as it was adverse to the title of the mortgagor, said Patrick, was not a proper subject for consideration or adjudication in a proceeding in equity to foreclose the mortgage. *Gage v. Perry*, 93 Ill. 176; *Bozarth v. Landers*, 113 id. 181.

The foreclosure decree assumes to declare the title and interest of Ellen O'Connor as follows: that which she had as the grantee of Patrick J.; that which she was entitled to as a homestead interest, and such right as she had obtained by taking possession of the lot in 1874 as one of the heirs of Martin O'Connor, deceased, (not the appellee, but his uncle, who died in 1868,) and holding such possession continuously therefrom, and that she had an equity by reason of having made such improvements as had been made on the lot. In the order of sale, while the direction is to sell "said interest in said lot 6, block 116, belonging to said Patrick J. O'Connor at the time of the execution of said mortgage, as well as whatever interest the said defendant, Ellen O'Connor, may have acquired in or to said premises by, through or under Patrick J. O'Connor since the execution of said mortgage to said complainant," still the further declaration of the order is, that "said sale of said lot shall be made subject to the right of homestead interest therein in favor of said defendant, Ellen O'Connor, and subject also to whatever interest, if any, said Ellen O'Connor has in said property as one of the heirs of Martin O'Connor, deceased." Appellee now denies that said Ellen O'Connor had or ever claimed any interest in the lot as one of the heirs of his said uncle, Martin O'Connor, deceased, or that she ever took possession in virtue of a claim based on such heirship.

The husband of said Ellen O'Connor died in 1885, prior to the rendition of the decree, but the appellee denies that the "homestead interest" mentioned in the decree means the homestead interest which she, as the widow of her deceased husband, had capacity to succeed to under the statute. He denies that the homestead interest specified in the decree is the interest of that nature which the provisions of the deed from Patrick J. to said Ellen declare was the consideration for and purpose to be attained by that conveyance. Her possession mentioned in the decree had not ripened into title or claim of any kind when the decree was rendered. Appellee's insistence is that this decree has no other effect than to invest the purchaser under it with such title as Patrick J. had.

The only paper title held by Patrick J. was the deed from his sister, Mary Ann. Mary Ann had no other paper title than the deed from Hillyer. Hillyer had a tax title for the lot,—whether other paper title or not does not appear. The appellant, as the purchaser at the mortgage sale, (even under appellee's view,) obtained by his deed made in pursuance of that sale such title as Hillyer had. It does not appear from this record that any one possessed a title to the lot by a chain of title from the general government, or by adverse possession or any character of prescription at the date of the execution of the mortgage by said Patrick J. O'Connor or at the time of the rendition of the decree. Conceding, however, that the proof heard in the cause justified the conclusion that said Ellen O'Connor has held open, continuous, adverse possession of the lot for the period of twenty years, (including the period before and that subsequent to the rendition of the foreclosure decree,) and conceding, then, that the master's deed to appellant should be considered as passing only such title as Patrick J. O'Connor had when he executed the mortgage, what should be declared, from an equitable standpoint, to be the extent of that title,

as between the appellee and appellant, under the proof in this cause?

We think it was established by the proofs that the appellee and his brother Thomas, acting in concert, by direct representations and by their acts and conduct declared to John O'Connell, Sr., that the paramount legal title to the lot was in said Patrick J. O'Connor when the mortgage to O'Connell was executed, and that said John O'Connell, Sr., was induced to accept said Patrick J. as being possessed of the true and paramount title to the lot by such representations and acts of the appellee and his brother Thomas, and that such representations were made and course of conduct pursued with the intent to induce said John O'Connell, Sr., to part with his money on the faith that a mortgage executed by Patrick J. would create a lien on the true title to the lot to secure the re-payment of the mortgage debt, and that said John O'Connell, Sr., was thereby induced to surrender an obligation which he held against the appellee for the payment by appellee of the sum of \$50, and to loan the sum of \$200, and accept as security for said note and money the mortgage given by Patrick J. on the lot in question. The appellant was present and heard the representations and statements so made by the appellee and his brother Thomas to said John O'Connell, Sr. Upon principles of natural justice ought the appellee be now allowed to insist the mortgage given by Patrick J. did not create a lien on the lot for the re-payment of the mortgage debt, and be granted a decree canceling the master's deed based on the mortgage, without the imposition of equitable terms and conditions? The application of the appellee to a court of chancery for a decree for the cancellation of the deed, based upon that mortgage, is subject to the maxim that he who seeks equity must do equity. The jurisdiction of chancery to decree the cancellation of deeds is on the ground it is against conscience for the party holding the deed to retain it or

attempt to enforce it against the complainant. Speaking with reference to applications to courts of equity for the rescission, cancellation and delivery up of deeds, agreements, etc., Mr. Story, in his work on Equity Jurisprudence, (vol. 2, sec. 639,) says: "The application to a court of equity for either of these purposes is not, strictly speaking, a matter of absolute right, upon which the court is bound to pass a final decree, but it is a matter of sound discretion, to be exercised by the court either in granting or in refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case. * * * And in all cases of this sort, where the interposition of a court of equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require, and if the plaintiff refuses to comply with such terms his bill will be dismissed. The maxim is here emphatically applied, he who seeks equity must do equity."

In the determination of the application of the appellee for a decree of a court of chancery canceling the deed made by the master to the appellant, it should be considered that the deed is an outgrowth of the mortgage from his brother Patrick J., which the appellee induced to be accepted as constituting a valid lien on the true title to the lot in question, and it should be held the deed relates back to the mortgage, and that it should not be canceled at the instance of appellee except on condition that the appellee should pay to the appellant the sum of money intended to be secured by the mortgage, namely, \$250, together with interest thereon at the legal rate from the date of the execution of the mortgage, and that in default of such payment his bill should be dismissed.

The decree is reversed and the cause remanded, with directions to take such further proceedings in the cause as may be consistent with the views herein expressed.

Reversed and remanded.

WALTER H. BROWNE, Admr.

v.

SIEGEL, COOPER & Co.

Opinion filed June 19, 1901.

1. MASTER AND SERVANT—*servant assumes risk of obvious dangers.* A servant assumes not only the ordinary risks of his employment but also all dangers which are obvious, and if he enters into the service, knowing or having the means of knowing its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of injury.

2. SAME—*when master is not liable for servant's death.* The owner of a building is not liable for the death of a servant caused by his falling down an open elevator shaft, where, although plaintiff's evidence is sufficient to sustain a finding that defendant was negligent in failing to safeguard the elevator entrance as required by ordinance, yet the same evidence shows not only that deceased assumed the risk, but was guilty of contributory negligence.

3. SAME—*question whether servant assumed risk may become one of law.* Ordinarily, whether a servant has assumed the danger which he encounters or has been guilty of contributory negligence are questions of fact, but they become questions of law when all reasonable minds could draw but one conclusion from the evidence.

4. ELEVATORS—*master's liability respecting elevator shaft and mine shaft is not the same.* A material difference exists between the liability of a master for failure to observe a city ordinance respecting elevator shafts and the statutory liability created by the act "providing for the health and safety of persons employed in coal mines," since the act itself creates a liability for willful violation thereof or willful failure to observe its provisions.

Browne v. Siegel, Cooper & Co. 90 Ill. App. 49, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

BENSON LANDON, and B. C. BACHRACH, (WILLIAM S. FORREST, of counsel,) for appellant:

Under the evidence in this case the following questions were for the jury, and it was error not to submit each and all of said questions to the jury:

First—Negligence of defendant in failing to comply with the ordinance by guarding the elevator shaft on the second floor with a door that could be opened only from the inside, as required by the ordinance of the city of Chicago. *Siddall v. Jansen*, 168 Ill. 43; *Dallemand v. Saalfeldt*, 175 id. 310; *McRickards v. Flint*, 21 N. E. Rep. 153; *Carterville Coal Co. v. Abbott*, 181 Ill. 495; *Jupiter Mining Co. v. Mercer*, 84 Ill. App. 101.

Second—Proximate cause in this case was a question of fact for the jury. *Dallemand v. Saalfeldt*, 175 Ill. 310; *Pullman Car Co. v. Laack*, 143 id. 244; *Flint v. Railway Co.* 59 id. 349; *Railway Co. v. Dudgeon*, 184 id. 477; *Swift & Co. v. Rutkowski*, 182 id. 18.

Third—Contributory negligence. *Fisher v. Cook*, 23 Ill. App. 621; *McRickards v. Flint*, 21 N. E. Rep. 153; *Siddall v. Jansen*, 168 Ill. 47; *Dallemand v. Saalfeldt*, 175 id. 310; *Carterville Coal Co. v. Abbott*, 181 id. 495; *Jupiter Mining Co. v. Mercer*, 84 Ill. App. 101.

Fourth—Assumed risk. *Illinois Steel Co. v. Bauman*, 178 Ill. 355; *Shearman & Redfield on Negligence*, secs. 216, 217; *Railway Co. v. Bailey*, 43 Ill. App. 292; *Railway Co. v. Hines*, 132 Ill. 168; *Consolidated Coal Co. v. Wombacher*, 134 id. 57; *Whalen v. Railway Co.* 16 Ill. App. 320; *Dallemand v. Saalfeldt*, 175 Ill. 310.

In *Siddall v. Jansen*, 168 Ill. 43, which was a case growing out of an accident through the door of an elevator shaft being not fastened as the ordinance required, this court said: "The evidence produced by the plaintiff below tends to show there was not on the part of the defendant a compliance with the ordinance. A peremptory instruction having been given to the jury to find for the defendants, there was consequently no evidence produced by them. As there was evidence tending to show there was no compliance with the provisions of this ordinance and that plaintiff was rightfully at the place of the injury, it was a question which should have been submitted to the jury."

A willful disregard by the employer of a duty imposed is a willful exposure to liability to injury of the employee, and is an act of negligence of so gross a character and so utterly in disregard of law that the question of contributory negligence, merely, has no place in the case. *Carterville Coal Co. v. Abbott*, 181 Ill. 495; *Jupiter Mining Co. v. Mercer*, 84 Ill. App. 101.

W. N. WILLIAMS, and O. W. DYNES, for appellee:

Where, at the conclusion of plaintiff's evidence, the trial court finds the same insufficient to sustain any verdict other than one of not guilty, he may direct the jury to return a verdict for the defendant. *Simmons v. Railway Co.* 110 Ill. 340; *Patton v. Railway Co.* 82 Fed. Rep. 979; *Randall v. Railway Co.* 109 U. S. 322; *Duggan v. Railway Co.* 42 Ill. App. 536; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Powditch v. Boston*, 101 id. 16; *Griggs v. Huston*, 104 id. 553.

In the case of an employee performing services on the freight elevator of an employer the rule of common carrier liability does not exist. *Bell v. Exposition Co.* 76 Ill. App. 591; *Webb on Passenger and Freight Elevators*, 78, and cases cited; *McDonough v. Lanther*, 57 N. W. Rep. 152; *Sievers v. Railway Co.* 14 Gray, 466; *Ryan v. Railway Co.* 23 Pa. St. 284; *Railway Co. v. Salmon*, 11 Kan. 83; *Gillshannon v. Railway Co.* 10 Cush. 228.

The master is not required by law to exercise any greater degree of care for the safety of an employee than that employee is required to exercise for his own safety. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Abend v. Furnace Co.* 107 id. 44; *Railway Co. v. Flannegan*, 77 id. 365; *Simmons v. Railway Co.* 110 id. 340; *Abend v. Railway Co.* 111 id. 202.

An employee assumes the risk of performing work under the conditions which he knows to exist, and which by the exercise of ordinary care upon his part he should understand and appreciate the dangers of. *Railway Co. v. Driscoll*, 176 Ill. 330; *Pennsylvania Coal Co. v. Lynch*, 90

id. 333; Wharton on Negligence, sec. 214; *Clark v. Railway Co.* 92 Ill. 43; *Railway Co. v. Britz*, 72 id. 261; *Hughes v. Railway Co.* 27 Minn. 137; *Camp Point Manf. Co. v. Ballou*, 71 Ill. 418; *Simmons v. Railway Co.* 110 id. 340; *Ladd v. Railway Co.* 119 Mass. 412; *Morey v. Coal Co.* 155 Iowa, 671.

Failure of a servant to exercise ordinary care for his own safety is in law considered to be contributory negligence, and bars recovery for injuries which it causes or contributes to cause. *Railway Co. v. Hessions*, 150 Ill. 546; *Railroad Co. v. Kelley*, 75 Ill. App. 493; *Railway Co. v. Fenimore*, 78 id. 479; *Railway Co. v. Batson*, 81 id. 142.

MR. JUSTICE CARTER delivered the opinion of the court:

At the conclusion of the evidence for the plaintiff the circuit court of Cook county, on motion of the defendant, instructed the jury to find the defendant not guilty. The Appellate Court affirmed the judgment rendered on the verdict, and the plaintiff took this his further appeal to this court.

The only question in the case is, did the court err in giving the peremptory instruction.

At the time he was killed Altemar Lavigne was a youth of nineteen years, and was, and had been for the preceding four months, employed by appellee as a porter in its department store in the city of Chicago, and worked with a gang of eleven porters, including himself, whose work and duties were to clean up five floors of the store building in the night time. In doing their work these porters, including Lavigne, used trucks containing sawdust to scatter over the floors, and brushes and brooms for sweeping, scrubbing and cleaning. In order to go from floor to floor, and to carry with them these utensils and material, it was necessary for them to use a freight elevator provided by appellee, and their custom was to take the elevator in the basement and go first to the fifth floor, and when that floor was cleaned to descend in the elevator to the next floor below, and so on until all the

five floors were swept and cleaned. It was the duty of one Bos, who was one of the porters and who worked with them, to run the elevator and to open and close the wire gate at the opening to the elevator door, to permit his co-laborers, as well as himself, to enter and leave the elevator at each floor. The elevator used was the north one of three which ran in elevator shafts on the east side of the building. These shafts were, at the second floor, enclosed in an elevator room, and the entrance to the north elevator was in this room and at the north end or side of the elevator. The accident happened on the second floor, after that floor had been cleaned and while Lavigne and his fellow-laborers were getting ready to take the elevator to descend to the first floor. There was no light in the elevator shaft or in the elevator room, but some gas jets were burning outside, five or six feet from the elevator room, which cast a dim light at the entrance to the elevator, which enabled the men to see through the door, when opened, whether the elevator was there or not, if they were standing within three or four feet of such entrance, but not if further away. The foreman carried a lantern and furnished one to each porter who would carry it. On the night of the accident, when the second floor had been cleaned, Bos, in performance of the separate duty assigned to him by his employer, went to the wire gate at the opening and found that the elevator was not there. The other parties were coming behind him to descend on the elevator to the next floor. Bos testified that Lavigne, having in his hands his broom and brushes, was standing several feet behind him in the elevator room; that he, Bos, raised the wire gate, which opened by sliding upward, and leaned into the elevator shaft to see where the elevator was, in order to bring it up or down, as might be necessary, and that at that moment he saw a dark body fall into the shaft by his side, and heard the rattling of what proved to be Lavigne's brushes and broom. It appears that as Bos leaned into

the shaft to look for the elevator, Lavigne stepped in and fell to the bottom and was instantly killed. The natural inference from the evidence is that Lavigne supposed the elevator was there, and mistook the motion of Bos in leaning into the shaft as the act of entering the elevator, and as the entrance was of sufficient width he stepped in, carrying in his hands his broom and brushes, and fell to his death.

It was shown by the evidence that other workmen, such as carpenters, painters, and the like, who also were employed by the defendant to perform work in their own line about the building in the night time, often used the same elevator while the porters were engaged in cleaning the rooms; that in so doing they would pull the elevator up or down from the floor where Bos had left it. Bos testified that he would often find that the elevator had been taken up or down from the floor where he had left it, and as he would bring it back he would call out in the shaft and give warning to the other workmen who had taken it away, so they would know that he had brought it back, but that he did not give such warning at the time of the accident; that the warning was not given to or for the benefit of the porters, but only to and for the other workmen who had taken the elevator away. He also testified that Lavigne was generally around there when he would get the elevator, and that if he had been standing where Lavigne was on the night of the accident he could have seen that the elevator was not there. The evidence showed that Lavigne knew that other workmen used the elevator, and that it had frequently happened that when the porters would be ready to descend the elevator would not be where Bos has left it, and that Bos would bring it up or down, as the case might be.

The principal act or omission charged as negligence in the declaration against the defendant was its failure to comply with an ordinance of the city of Chicago, which provided: "All elevator shafts, and all elevator enclos-

ures of every kind, shall have iron doors, which shall be made to open from the inside only, excepting only the door upon the ground floor of the building, which shall also have a lock to permit opening the same from the outside." It was alleged in proper terms that it was necessary for the safety of said Lavigne, while in the performance of his duties, that the elevator shaft or enclosure in which said elevator was used and operated should have had doors made to open from the inside only, and that the defendant neglected this duty and carelessly permitted the shaft or enclosure of this elevator to be without an iron door so made as to open from the inside only, and that by reason of such negligence of the defendant said Lavigne, while so performing his duties and while exercising due care for his own safety, fell into said elevator shaft or enclosure and was killed. It was also alleged that the place where said accident happened was not sufficiently lighted.

The ordinance and the defendant's failure to comply with its provisions were fully proved by the plaintiff, but it also appeared by the same evidence that Lavigne was fully informed of the manner in which the elevator was equipped and used. He knew that the only doors to the elevator and to the elevator shaft were the wire doors, which were opened from the outside by sliding upward. He knew that the other workmen employed about the building often used the same elevator while he and his co-laborers were cleaning the floors, and that often when they would be ready to descend the elevator would not be at the floor where they had left it, but that Bos would have to open the wire gate and pull the elevator up if below or down if above,—so that from the evidence for plaintiff alone it appeared that he had, for several months prior to the accident, knowledge of the dangers to which he and others were exposed by the use of the elevator by others, and by the failure and neglect of the defendant to comply with the ordinance. The evidence adduced by

the plaintiff was sufficient to sustain a finding that the defendant was guilty of negligence in failing to safeguard the entrance to its elevator as required by the ordinance, but the same evidence proved that Lavigne assumed the danger caused by such neglect of the defendant. He had knowledge that the only bar to the entrance to the elevator shaft was the sliding wire gate, which was opened from the outside instead of from within; that other workmen used the same elevator and would leave it at other floors, and that Bos would often bring it back, as he did on the night in question, when they would be ready to descend to the next floor.

The master's duty requires him to furnish the servant a place ordinarily safe in which to work, and that the machinery, means and appliances which he provides for the service shall be ordinarily safe and free from danger to the servant in their use, and the servant has the right to assume that he has performed this duty. But even if the master fails in such duty, and there are, to the knowledge of the servant, defects in such machinery, means and appliances which render their use hazardous, he is held to have assumed the hazard, for he cannot go on with knowledge of the danger, without complaint, until he is injured and then hold the master liable. The servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of personal injury. (*Toledo, Wabash and Western Railway Co. v. Black*, 88 Ill. 112; *Beach on Contributory Negligence*,—3d ed.—518.) In the case at bar, the evidence for the plaintiff showed that Lavigne knew of all the conditions which gave rise to the risks or dangers in using the elevator as it was used, and the jury would not have been justified in finding, from the evi-

dence, that he did not know. With this knowledge he not only continued in the service, but at the time of the accident, without waiting for his associates to come into the elevator room who were to descend with him, and without waiting to ascertain whether the elevator was at the opening, or for Bos to get on the elevator first, as he had been accustomed, and without inquiry, he passed Bos, whose attention was absorbed in looking for the elevator, and stepped off into the elevator shaft. We are of the opinion that the jury must have found, from his prior knowledge, not only that he had assumed the danger, but that at the time of the accident he was guilty of such negligence as materially contributed to the injury. We are unable to see how reasonable minds could disagree on this question. Had the issue been submitted to the jury and a verdict returned for the plaintiff, it would have been the duty of the court to set it aside, because the evidence was legally insufficient to establish a liability. There was therefore no error in instructing the jury to find the defendant not guilty.

We cannot agree with counsel that the aspect of the case is materially changed by the absence of sufficient light in the shaft or elevator room to enable Lavigne to see the elevator at the distance he stood from the opening, for the reason that lanterns were provided for all the porters who would carry them, and we cannot say that the defendant was bound to provide stationary or any particular kind of lights.

Counsel for appellant contend that elevator wells or shafts are as dangerous as shafts in mines, and cite *Carterville Coal Co. v. Abbott*, 181 Ill. 495, in support of the proposition that where there is a willful violation of a duty imposed by positive law, as by statute or municipal ordinance, for the protection of life or limb, the injury will be deemed willful, and contributory negligence is no defense. However dangerous elevator shafts may be, a material difference exists between the statutory liability

created by the statute of this State "providing for the health and safety of persons employed in coal mines," enacted in obedience to the constitution, and the liability arising from negligence in failing to observe an ordinance concerning elevators and elevator shafts, designed to guard against dangers arising from their use. The statute referred to, itself creates a liability for any injury to person or property occasioned by any willful violation of it or any willful failure to comply with its provisions. (Hurd's Stat. 1897, chap. 93, sec. 14, p. 1091.) For any willful injury, the lack of ordinary care or contributory negligence on the part of the one injured is no defense. But the case at bar is not of such a character, neither by its allegations nor its proof. Ordinarily, of course, the question whether the servant has assumed the danger which he encounters, or has been guilty of contributory negligence, is one of fact, but, as in other cases, the question will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds.

We do not regard anything said in the cases cited (*Pullman Palace Car Co. v. Laack*, 143 Ill. 242, *Dallemand v. Saalfeldt*, 175 id. 310, *Fent v. Toledo, Peoria and Warsaw Railway Co.* 59 id. 349, *Swift & Co. v. Rutkowski*, 182 id. 18, and *North Chicago Street Railroad Co. v. Dudgeon*, 184 id. 477,) as in conflict with the holding in the case at bar. Whether injuries which occur because of the violation by the master of municipal regulations enacted for the preservation of life or limb should be regarded as willful and not subject to the defense of contributory negligence, or to the defense of the implied assumption by the servant of the risks and dangers caused by such violation, is a question of public policy for the legislature, and not one for the courts. We can only apply the law as it is.

Finding no error in the record the judgment must be affirmed.

Judgment affirmed.

THE WILLIAM GRAVER TANK WORKS

v.

PATRICK H. O'DONNELL, Admr.

Opinion filed June 19, 1901.

191	236
196	1347
196	349
100a	1611

191	236
199	187
199	187

191	236
103a	438

191	236
202	338
202	339

191	236
208	504
208	150
107a	619
109a	192

191	236
207	16

191	236
215	290

1. TRIAL—*case should go to jury if evidence warrants different conclusions.* In an action for negligence, if reasonable minds might reach different conclusions from the evidence introduced, together with all justifiable inferences to be drawn therefrom, the court should not take the case from the jury.

2. MASTER AND SERVANT—*servant not required to disobey foreman unless danger is imminent.* A servant ordered by his foreman to work in a dangerous place is not required by law to disobey him, nor by obeying to assume the risk of obedience, unless the danger is so imminent that a man of ordinary prudence would not incur the risk.

3. SAME—*whether an ordinary man would not have incurred risk is a question of fact.* Whether the danger to which the plaintiff's intestate was exposed was so imminent that a man of ordinary prudence would not have incurred it is a question of fact for the jury.

4. SAME—*what facts immaterial to right of recovery in action for negligence.* In an action for the death of a servant, caused by falling from a dangerous scaffold where he was ordered by his foreman to go and assist in keeping the upper sections of a heavy iron pipe from turning while the lower one was being unscrewed, it is immaterial to the right of recovery whether the servant lost his balance and fell from his perilous position or whether he was twisted off the scaffold by the efforts of the other men to unscrew the pipe.

5. SAME—*rule where foreman is acting temporarily as a co-laborer with injured servant.* If a servant is injured as the result of an act of the foreman involving the exercise of his authority, the fact that the foreman, at the time of the injury, is temporarily acting as co-laborer with the injured servant does not relieve the master from liability upon the ground that they were fellow-servants.

Graver Tank Works v. O'Donnell, 91 Ill. App. 524, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES G. NEELY, Judge, presiding.

A. B. MELVILLE, and F. J. CANTY, for appellant.

ELA, GROVER & GRAVES, and WING & CHADBOURNE, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action on the case, brought in the circuit court of Cook county by the appellee, as administrator of the estate of Isaac D. Alyea, deceased, to recover damages for negligently causing the death of his said intestate. A trial resulted in a verdict in favor of appellee for \$5000, upon which verdict, after overruling a motion for a new trial, the court rendered judgment, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

The appellant, at the close of appellee's evidence and again at the close of all the evidence, moved the court to withdraw the evidence from the jury and to instruct them to find for the appellant, which the court declined to do, and which action of the court in that regard was excepted to by the appellant and is relied upon mainly as a ground for reversal in this court.

There was little conflict in the testimony. On September 9, 1896, Isaac D. Alyea, who was an employee of the appellant, was injured by falling from a scaffold used in the erection by appellant of a steel grain elevator in the city of Chicago, from the effect of which he died on the following day. Said elevator was fifty feet high and thirty feet in diameter, and was constructed of steel sheets ten feet long and five feet wide, riveted together, the floor and roof thereof being of the same material. After the bottom was placed in position, pieces of said steel plate were placed thereon and riveted to it and end to end, until they formed a circular wall five feet high. A scaffold, both on the inside and the outside of the tank, was then erected in order that the next section of five feet might be riveted onto the first section. Such scaffold was carried up on the inside and the outside of the

tank until the top was reached, when the tank was roofed over. In order to do this, appellant's employees, including Alyea, screwed together three sections of six-inch iron pipe and set the pole thus formed in the center of the tank. On top of this they put a steel collar, upon which rested one end of certain iron beams, the other end being supported by the circular scaffold on the inside of the tank. On these beams planks were laid, and on the planks the workmen stood while putting on the iron rafters on which the roof plates were placed. A man by the name of Platt had charge of building the scaffolds. Alyea was a carpenter and worked on the inside scaffold. When the roof was completed the workmen commenced to take down the scaffolding. First they removed the top from the center scaffold, then the side beams, then cut the stay wires and moved the pipe over to one side, against the scaffold, just as it was when they had finished screwing it together and before they had moved it to the center of the tank. They then attempted to unscrew the bottom length of the pipe preparatory to taking it down. There were present at that time, Holub, Alyea, Streed, Flanagan, Platt and Wedgewood, and a man by the name of Lee, who was general foreman of appellant in the tank construction work. Flanagan and Platt were at the top of the inside scaffold, holding the pipe. Alyea and Streed were on the same scaffold, about eighteen feet from the floor, holding the pipe, Alyea with tongs and Streed with a rope around the middle section, while Lee, Holub and Wedgewood, holding the pipe at the bottom with tongs, attempted to unscrew the bottom section thereof, when Alyea either fell or was twisted off from the scaffold. At the time Alyea was directed to go up on the scaffold with the tongs to hold the pipe he said to Lee, "There is only one plank there," to which Lee replied, "Go up there; damn it! get up there," when he immediately went up onto the scaffold and took hold of the pipe with the tongs.

The law is well settled that where there is evidence tending to establish a cause of action it is not error to refuse a peremptory instruction to find for the defendant; (*National Syrup Co. v. Carlson*, 155 Ill. 210; *Illinois Steel Co. v. Schymanowski*, 162 id. 447;) and where reasonable minds might reach different conclusions from the evidence offered, together with all justifiable inferences to be drawn therefrom, the court should not take the case from the jury. (*Offutt v. World's Columbian Exposition*, 175 Ill. 472.) Alyea, in a peremptory manner, was ordered by his foreman to take a pair of tongs, weighing from forty to fifty pounds, and go up onto a scaffold eighteen feet above the floor of said elevator, and stand upon a board one foot wide and assist in holding the upper sections of said iron pipe from turning while the lower section was being unscrewed by the combined strength of three men. At the time of the accident he was acting under the specific directions of his foreman, and he was not required by law to disobey him, or by obeying assume the hazard of obedience, unless the danger to which he was so exposed was so imminent that a man of ordinary prudence would not have incurred such risk. In *Offutt v. World's Columbian Exposition*, *supra*, on page 479 it is said: "The rule is, that where the servant is injured while obeying the orders of his master to perform work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it." In *Illinois Steel Co. v. Schymanowski*, *supra*, we say (p. 456): "Where a corporation authorizes one of its employees to have the control over a particular class of workmen in any branch of its business, such employee is, *quoad hoc*, the direct representative of the company. The commands which he gives within the scope of his authority are the commands of the company itself, and if such commands are not unreasonable those under his charge are bound to obey, at the peril of losing their situations. Hence the company will be held responsible for the consequences."

The question whether the place into which Alyea was ordered by his foreman was attended with such imminent danger that no man of ordinary prudence, having knowledge of the situation which he had, would have incurred the same by going upon such scaffold, was one of fact for the jury. *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; *Offutt v. World's Columbian Exposition*, *supra*.

We are unable to say, as a matter of law, that the evidence, with all the inferences which the jury might justifiably draw therefrom, does not tend to establish a cause of action, and are of the opinion the court did not err in refusing to take the case from the jury.

The court, at the request of appellant, submitted to the jury the following special finding:

Q. "Was Alyea, the deceased, twisted off of the plank upon which he stood, by Lee and Holub, while they both had hold of the tongs trying to unloosen or unscrew the joints?—A. We don't know."

It is insisted by appellant said special finding is inconsistent with the general verdict, and that the court should have rendered judgment on said finding in favor of the appellant. We do not agree with such contention. The actionable negligence of appellant was the sending of Alyea into an unsafe and dangerous place in which to perform the labor in which he was engaged, and it was wholly immaterial whether he lost his balance and fell from the perilous position in which he stood, or was twisted or thrown therefrom by the force exerted upon the pipe by the workmen below in their endeavors to unscrew the same.

Neither do we agree with the contention that had the jury answered the interrogatory in the affirmative it would have shown that Alyea, Lee and Holub were fellow-servants, which would have defeated a recovery. As the doctrine is well settled in this State that where a servant is injured as the result of an act of the foreman involving the exercise of his authority, the fact that the

foreman, at the time of the injury, is temporarily acting as co-laborer with the injured servant does not relieve the master from liability upon the ground that they were servants of one common master. *Chicago and Alton Railroad Co. v. May*, 108 Ill. 288; *Pittsburg Bridge Co. v. Walker*, *supra*; *Offutt v. World's Columbian Exposition*, *supra*; *Metropolitan West Side Elevated Railroad Co. v. Skola*, 183 id. 454.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

THE CENTRAL RAILWAY COMPANY

v.

ADDIE KNOWLES.

Opinion filed June 19, 1901.

1. EVIDENCE—*what tends to establish cause of action against street railway company.* In an action against a street railway company for negligence, a peremptory instruction to find for the defendant is properly refused where the evidence is that plaintiff was driving along the street delivering vegetables; that a street car passed the wagon and stopped some distance ahead; that plaintiff started to cross the track in the rear of the car, when it suddenly backed up without warning and overturned the wagon, throwing the plaintiff out and injuring her.

2. INSTRUCTIONS—*peremptory instruction asked as one of the series comes too late.* A peremptory instruction to find for the defendant should be requested at the close of the evidence, and comes too late when asked as one of the series submitting the case to the jury.

Central Ry. Co. v. Knowles, 93 Ill. App. 581, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge presiding.

This is an action, brought by appellee against the appellant company to recover damages for personal injuries, claimed to have been sustained by her on Novem-

191	241
101a	47
191	241
108a	482
206	150
191	241
112a	448

ber 14, 1899, in the city of Peoria in a collision with one of the street cars then being operated by appellant on Adams street in that city. The trial below resulted in verdict and judgment in favor of appellee, from which an appeal was taken to the Appellate Court. The Appellate Court affirmed the judgment of the circuit court, and this appeal is prosecuted from such judgment of affirmance.

In its decision of this case the Appellate Court makes the following statement: "Appellee's husband kept a market garden, and appellee drove a one-horse market wagon into the city, and delivered vegetables at the houses of their customers. She has been engaged in this business four years. On November 14, 1899, she was driving south on Adams street by the side of appellant's street car tracks, and was sitting upon a high seat on the market wagon. A little ahead of her was Chestnut street, crossing Adams street at right angles. Appellant had two lines from that point, one line continuing along Adams street, and the other turning east on Chestnut. The Main street cars turned on to Adams street several streets further north, passed along Adams to Chestnut, and then turned down Chestnut. There was a switch at the junction of Adams and Chestnut streets, and, when a Main street car came along Adams street and wished to turn down Chestnut street, it was necessary for the motorman to stop or nearly stop his car, and turn the switch, if not already turned. A Main street car passed the appellee, going south, a short distance north of this switch. After it passed her, she turned to drive across to the other side of the street. The motorman failed to turn the switch, and ran a few feet by. It became necessary to back the car to the switch. * * * The motorman started the car backward, and it moved back several feet, the precise number being variously estimated by different witnesses. * * * The wagon was struck by the car, and she was thrown from her high seat to the ground and injured."

I. C. PINKNEY, for appellant.

ARTHUR KEITHLEY, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this case the argument in behalf of the appellant is taken up almost entirely with a discussion of questions of fact. Counsel for appellant seeks to establish in his brief, that the verdict was contrary to the weight of the evidence. The weight of evidence is not a matter for our consideration. The judgments of the lower courts are conclusive upon this court as to the facts.

At the close of all the evidence, counsel for the appellant submitted an instruction to the court, directing the jury to find for the defendant below. This instruction was refused. Whether or not the action of the court in refusing to give this instruction was correct is the only question, which we can consider in this case. The court properly refused the instruction, so asked by the appellant, for two reasons.

In the first place, the instruction was properly refused for the reason that it was submitted with other instructions for the appellant. It has been held by this court that, where the defendant desires the court to pass upon the legal question whether or not there was any testimony before the court tending to prove the plaintiff's case, and to bring that question before this court for review as a question of law, the defendant should ask to have the case withdrawn from the jury before the final submission of it. The rule has recently been thus stated: "If a party desires to rely upon a peremptory instruction to find for the defendant, such instruction must be asked at the close of the evidence for the plaintiff, or at the close of all the evidence. It is too late to submit an instruction of that character with a series of other instructions." (*Chicago Great Western Railway Co. v. Mohan*,

187 Ill. 281, and cases there cited). Counsel for appellant insists, however, that an examination of the abstract, presented by him, will disclose that the instruction in question was not submitted with the series of other instructions. If the contention of counsel in this regard is correct, it is nevertheless true that the instruction was properly refused for the second of the reasons above referred to, namely, that there is evidence in the record tending to establish the cause of action, set up in the declaration of the plaintiff below.

It has come to be quite common with counsel for the defense in personal injury cases to ask for an instruction, directing the jury to find for the defendant. This instruction seems to be asked in many cases, merely for the purpose of forcing this court to make a review of the evidence. It is not the function of this court to discuss the facts in common law cases, which are tried before juries, inasmuch as the judgments of the lower courts are final and conclusive in regard to the facts. Therefore, an instruction to find for the defendant should never be asked by counsel where it is clear that there is evidence in the record, tending to establish the cause of action. Such an instruction should only be asked where there is doubt as to the tendency of the evidence to support the cause of action, and where it is a fair subject of inquiry whether the evidence does or does not have such tendency. In the case at bar, it is quite clear to our minds that the evidence tended to show a cause of action, and whether or not the weight of the evidence was with the plaintiff or the defendant below was a matter for the lower courts, and not for this court.

In the case at bar, the testimony tends to show that, when the street car reached Chestnut street, it passed on down Adams street without turning to the east on the switch tracks, which ran from Adams street into Chestnut. The appellee, who was driving along the side of the car, or in the rear of it, seeing that the car did not

turn to the east on Chestnut street, turned her wagon to cross the tracks, when the car, instead of continuing to go forward, suddenly backed and struck her wagon. As is said by the Appellate Court in its opinion: "The common course of street cars is forward and not backward;" and a person, traveling along a public street, would not ordinarily be required to watch a car that had passed to see if it was not going to stop and run backward instead of going forward. There was evidence, tending to show that the appellee did not know that the car was going to stop its forward motion, and make a backward movement. It seems that, in such cases, bells are rung as signals between the motorman and the conductor, from the motorman to advise the conductor that he wishes to go back, and from the conductor to advise the motorman that the track is clear for him to go back. There is testimony, tending to show that these signals in the present case, even as between the motorman and the conductor, were not given at all. There is also evidence tending to show that, even if they were given, they were not heard by the appellee. There is also evidence, tending to show that these signals are not intended as guides for persons traveling along the street or across the street car tracks, but only as guides for the motorman and the conductor as between themselves. Such being the tendency of the proof, it cannot be said that there was no evidence tending to show that the appellee was in the exercise of ordinary care for her own safety and the safety of her wagon.

There was evidence also tending to show negligence on the part of the appellant. In *Croswell's* work on the law relating to electricity, (sec. 743), it is said: "One of the most important points in the operation of an electric car is that the motorman should keep a careful watch ahead to see what is before him and thus guard against accidents. Inattention on his part to the business of governing the motions of the car, as required by the actions of teams and travelers, is negligence of the com-

pany; and if the car is backing, there should be some one on the rear end to look out for travelers." There is evidence tending to show that, when the car had passed on down Adams street beyond the switch instead of turning to the east on Chestnut street, and appellee had turned her wagon to cross the tracks, the conductor was standing with his back turned toward appellee, and towards the tracks in the rear of the car. If this was so, then the record presents a case where a street car was backing, and there was no one on the rear end of it who was looking out for travelers.

In view of what is said above, we are of the opinion that the court below committed no error in refusing to give the instruction asked by the appellant.

Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

GEORGE T. CLINE

v.

JOHN C. PATTERSON.

Opinion filed June 19, 1901—Rehearing denied October 4, 1901.

ATTACHMENT—*effect of failure of writ to state the ground of attachment.* The failure of a writ of attachment to state the ground of attachment, as required by section 6 of the Attachment act, prescribing the form for such writs, does not render the writ void but merely defective, and subject, under section 28 of the same act, to amendment; but where there is no personal service or appearance by the defendant such defect is not waived by default, and may be taken advantage of on writ of error.

Cline v. Patterson, 88 Ill. App. 360, reversed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

IVES, MASON & WYMAN, for plaintiff in error.

JOHN C. PATTERSON, *pro se*.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is a writ of error to the Branch Appellate Court for the First District to bring before us for review a judgment of that court affirming a judgment of the circuit court of Cook county in attachment. The writ was levied on real estate of the defendant, but there was no personal service and the defendant did not appear. The service was by publication, only. Judgment by default was rendered and an order entered for special execution against the property attached.

It was assigned for error in the Appellate Court, and has been in this court also, that the attachment writ was void because it failed to state the ground of the attachment set out in the affidavit, or any ground for the writ. The cause of the attachment as stated in the affidavit was, that the defendant below was a non-resident of the State. Section 6 of the act in regard to attachments in courts of record (Hurd's Stat. 1899, p. 176,) prescribes the form (substantially) of a writ of attachment, from which it appears that the cause of the attachment, as set out in the affidavit, is required to be stated in the writ. We have no doubt that this was intended to be a substantial part of the writ, and that its omission left the writ defective or insufficient. But section 28 provides that "no writ of attachment shall be quashed, nor the property taken thereon restored, nor any garnishee discharged * * * on account of any insufficiency of * * * the writ of attachment, * * * if the plaintiff * * * shall cause * * * the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient."

We are of the opinion that the writ was not void, and therefore incapable of amendment, but that, under the statute, the plaintiff below might have caused it to

be amended. It does not come within the rule stated in *Sidwell v. Schumacher*, 99 Ill. 426, *Weaver v. Peasley & Co.* 163 id. 251, and other cases of like character, holding that process which is not under the seal of the court or which does not run in the name of the People is void. This writ had all the formal requisites required by the statute, was duly attested, but was insufficient, under the statute, because by the omission of a part of its substance it was not substantially in the form prescribed, but it was clearly amendable under section 28 of the act. The attachment proceedings were therefore erroneous but not void, and the court was not without jurisdiction.

It is said, however, that by not appearing and moving to quash the writ the defendant below waived the defect and cannot now avail himself of the error. We are not of that opinion. If the defendant below had appeared he might have waived the defect, but as the judgment was by default the plaintiff in that court was bound, at his peril, to cause the writ to be amended, so that the record, on its face, would appear to be free from error. It is a general rule that where the defendant does not appear he waives nothing. (2 Ency. of Pl. & Pr. 601, 602; *Holgate v. Broome*, 8 Minn. 243.) The judgment having been by default, the objection can be availed of on error. (*Reitz v. People*, 77 Ill. 518; *Lawrence v. Yeatman*, 2 Scam. 15.) Had the defendant below appeared and moved to quash the writ, it would have been error to overrule the motion unless the plaintiff had caused the writ to be amended; but not having appeared, and the judgment being on default, he may have advantage of the same error here.

The judgments of the Appellate and circuit courts are both reversed and the cause is remanded to the circuit court for further proceedings.

Reversed and remanded.

FRIEDERICH SCHULTZ v. LIEB SROELOWITZ *et al.*
and
JOHN C. KRASA v. SAME.

Opinion filed June 19, 1901—Rehearing denied October 4, 1901.

1. MORTGAGES—*assigned mortgage is not subject to latent equities of third parties.* A mortgage is assignable only in equity, and in a proceeding to enforce the lien created by it it is subject to all equitable defenses existing between the original parties, but not to latent equities of third persons.

2. SAME—*when assignee of a mortgage is protected against payments made to trustee.* The rule requiring the assignee of a mortgage securing notes endorsed in blank to give notice, actual or constructive, in order to protect himself against payments by the mortgagor to the mortgagee, does not extend to subsequent purchasers of the property who assume and agree to pay the encumbrance, and, notwithstanding the assignee has not recorded the assignment or given notice thereof to any one, he is entitled to protection against payments made by the purchasers to the mortgagee in the belief that he still owned the indebtedness.

CARTWRIGHT and BOGGS, JJ., concur in conclusion, only; HAND, J., dissenting.

Sroelowitz v. Schultz, 86 Ill. App. 341, reversed.

APPEAL from and writ of error to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

This was a bill to foreclose a deed of trust in the nature of a mortgage and to set aside a fraudulent release of the same. The prayer of the bill was granted by the circuit court, but on appeal the decree was reversed by the Branch Appellate Court and the cause remanded, with directions to dismiss the bill for want of equity. The case is now before us on appeal of Friederich Schultz, the complainant in the bill, and on writ of error sued out by John C. Krasa, one of the defendants.

It appears from the record that on February 14, 1891, said John C. Krasa made his promissory note for \$4500, payable to himself five years after date at the office of

191	249
98a	*201
e98a	*208
98a	*205
98a	*206

191	249
d198	*888

191	249
108a	*220
108a	*228
108a	*224
j108a	*225

Theodore H. Schintz, together with ten interest coupons payable in the same way, and endorsed the same in blank and delivered the same to said Schintz. At the same time he executed and delivered to Schintz, as trustee, his deed of trust on certain real estate to secure the payment of said note and coupons. A month later the complainant, Schultz, purchased and received from Schintz the notes and deed of trust at their face value but took no separate assignment of the deed of trust, nor did he give Krasa, the maker, any notice of the purchase or transfer. The securities were given by Krasa for a loan, the amount of which Krasa received from Schintz after the purchase by Schultz. On the 7th of May following, Krasa sold and conveyed the property so mortgaged by him, to Joseph Miller, subject to said deed of trust, and in and by the deed Miller assumed the payment of said mortgage debt as a part of the purchase money. Afterward, in February, 1892, Miller sold and conveyed the property to the appellees, Lieb and Anna Sroelowitz, and by the deed of Miller to them they assumed and agreed to pay the same mortgage debt as part of the purchase money, in the same terms as Miller had assumed the payment of the same. As the interest coupons matured they were taken by Schultz to the office of Schintz, where he received the money from Schintz. Sroelowitz paid the coupons to and received them from Schintz, supposing him to be the owner and holder of them and of the note and mortgage, he, Schintz, claiming to be such owner. Neither Krasa nor the appellees ever knew, until after the maturity of the principal note, that Schultz was the holder of it or had any interest in it, and it does not appear that Schultz knew of the sale and conveyance of the property by Krasa to Miller, or by Miller to Sroelowitz, until about the same time.

In August, 1895, Schintz notified appellees, the Sroelowitz, that the note would become due in six months, and in pursuance of this notice they went to see Schintz

in November following, and informed him that they could not pay the debt in full but could pay \$800 on it. It was then agreed between them and Schintz that they should pay the \$800 and execute a new note and mortgage for the balance, \$3700. This agreement was carried into effect on December 4, 1895, when the \$800 was paid and the new note and mortgage were executed and delivered to Schintz. The appellees were Russians, and were unable to read, write, speak or understand the English language, but understood the German, which Schintz also could speak. Schintz produced two papers having the appearance of a note and mortgage, and told them they were the note and deed of trust they were paying off and that they belonged to him. Appellees asked Schintz to read and explain the papers to them, which he pretended to do in German. They then requested him to cancel them by drawing lines across them, "as they do in Europe," and to give the papers to them; but he said that was not the custom in this country—that they were of no use and he would destroy them. He then tore them up and threw the pieces in the waste basket. Appellees also asked Schintz for "clearance papers," and he told them to come back in a few days; that he would have to go to court to clear the books; that he was too busy then. They called on him frequently afterward for a release, but he put them off from time to time, but finally informed them that the release deed had been filed and that everything was all right. The release was in fact filed for record on February 19, 1896. The note had become due a few days before, on February 14, and when Schultz presented it at Schintz's office for payment, Schintz told him that Krasa was not then ready to pay but was about to make a new loan to get the money, and that he, Schultz, would have to keep the papers and wait half a year longer; that his security was perfectly good. Schultz kept the note and deed of trust over a year after it became due, until some time in 1897, when he learned

that Schintz, as trustee, had executed and filed a release deed releasing the property from the lien more than a year before. After the payment of the \$800 and the making of the note and mortgage for \$3700, appellees paid interest to Schintz on that note, and not on the original note and deed of trust. Schintz was insolvent, and had sold and assigned the \$3700 note and mortgage. Schultz filed his bill, as above stated, to set aside the release and to foreclose his deed of trust, making Krasa and appellees parties defendant.

ARNOLD TRIPP, for appellant Schultz.

IVES, MASON & WYMAN, for plaintiff in error Krasa.

MOSES, ROSENTHAL & KENNEDY, for appellees and defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This case is the outgrowth of a fraudulent transaction of Theodore H. Schintz which must result in loss to one of two or more innocent parties. It is often a difficult matter in such cases to determine upon which of such parties the loss should fall. The suit was brought by Schultz to foreclose, as a mortgage, the deed of trust, which, with the note, had been assigned to him by Schintz. It is well settled that the mortgage was assignable only in equity, and that in a proceeding to enforce the lien created by it, it is subject to all equitable defenses existing between the original parties but not to the latent equities of third persons. The rule is, that the assignee, to protect himself from payments by the mortgagor to the mortgagee, must give notice to the mortgagor, actual or constructive, of the assignment to him. (*Olds v. Cummings*, 31 Ill. 188; *McAuliffe v. Reuter*, 166 id. 491; *Towner v. McClelland*, 110 id. 542; *Buehler v. McCormick*, 169 id. 269; *Johnson v. Carpenter*, 7 Minn. 120.) In the case at bar, if Schultz, the assignee, had made inquiry of Krasa at the

time of his purchase of the securities, or had given him notice of the assignment, no reason would have been disclosed why the notes should not be paid; but in case Krasa had afterward made payments on his obligation such notice would have prevented payment to the wrong person, or at least Schultz would have done all that the law required, and he would have been protected in his right to enforce the lien. But Krasa never made any payments, and this is not a case where the maker has made payments to his mortgagee after the latter had assigned the note and mortgage, not knowing of such assignment, but, as we view the case, it is one where a third person, unknown to the assignee, had assumed and agreed to pay the mortgage debt, and in undertaking to comply with his agreement and make such payment has paid the wrong person. Schultz, prior to such payment, had no knowledge, actual or constructive, that appellees had purchased and procured conveyance of the property to them and had assumed and agreed to pay the mortgage debt. He was not charged with such knowledge by the recording of the deed to appellees, inasmuch as it was subsequent to the recording of his deed of trust. True, had he taken a written assignment of the mortgage and placed it on record it would have been notice to subsequent purchasers, as appellees were, of the assignment; but without any written assignment the mortgage, as an incident to the note, passed to him as assignee, and was enforceable in equity as an equitable assignment. His deed of trust was not only of record and so was notice to appellees when they purchased, but they had expressly assumed and agreed to pay the debt which it secured,—not as a debt to Schintz, but a debt evidenced by a note payable to the order of the maker and by him endorsed in blank, fully described in the deed of trust. Appellees were bound by their agreement to pay this debt to the one entitled to receive payment, and they would not be discharged from that duty by the fraud

of Schintz, in the absence of the fault or negligence of Schultz. As we have seen, Schultz was not bound to give notice to appellees of the assignment, but only to Krasa, the mortgagor. That was a duty which he owed to Krasa—not to third persons of whose interests he had no knowledge. Had he notified Krasa of the assignment, it could not, from such notice, be presumed that the information would have been imparted to appellees and the fraud of Schintz thus prevented.

It follows that no connection exists between the failure of Schultz to give notice to Krasa and the fraud of Schintz in procuring payment from appellees. Why, then, should the lien in favor of Schultz be defeated because the appellees allowed Schintz to practice a fraud on them? Thus, it was said in *Olds v. Cummings*, *supra*, (p. 192): "There are many cases in which the assignees have been protected against latent equities of third persons, whose rights, or even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as, for instance, a *cestui que trust*." Then, again, it was said in *Towner v. McClelland*, *supra* (p. 551): "Where a mortgage is assigned, and the mortgagor, without notice, pays the payee, who has parted with the note, that will discharge the mortgage, and in a suit to foreclose, such payment may be set up in bar of a decree for its foreclosure. The mortgagor, to release himself from liability on his note, must see that he pays the money to the holder of the note, who has received it by assignment before maturity, but not so to discharge the mortgage, because it is not assignable at law. The equitable assignee, to protect his rights against a payment by the mortgagor to the mortgagee, must give the former no-

tice, actual or constructive, of its assignment. He may place the assignment on record or give notice of the assignment to the mortgagor." And in *Buehler v. McCormick*, *supra*, it was said (p. 275) that "the purchaser knows from the papers who the mortgagor is, and may, by notice and inquiry, protect himself in making the purchase much more readily than the mortgagor may, if for any reason he is unable to obtain at once the cancellation and return of his obligations. The assignee is charged with knowledge of the law that a mortgage is assignable only in equity and subject to the equities between the original parties to it, and he cannot relieve himself from the consequences of his own negligence by simply showing that the mortgagor failed to take up the note and mortgage when he paid the debt to the then legal holder."

But we are unable to see how this equitable doctrine can be applied to the case at bar, for, as before said, the assignee, Schultz, had no knowledge that appellees had any interest in the matter or had assumed Krasa's obligation to pay the mortgage debt. Their equities must be classed with those mentioned as the latent equities of third persons. (*Silverman v. Bullock*, 98 Ill. 11.) As between appellees and Krasa, appellees, by their assumption of the mortgage debt, became principals and Krasa a surety. It being their duty to pay, they could not release themselves or the mortgaged property in their hands from their obligation, and leave the burden still resting upon Krasa as the maker of the note. Krasa's interest is to maintain the lien, and not to defeat it. The property became the primary fund for the payment of the debt. This court said in *Drury v. Holden*, 121 Ill. 130, that "it is well established that when a party purchases premises which are encumbered to secure the payment of indebtedness, and assumes the payment of the indebtedness as a part of the purchase money, the premises purchased are in his hands a primary fund for the payment of the debt, and it is his duty to pay it." How

did appellees discharge this duty? They simply relied on Schintz's representations that he was the owner and holder of the note and mortgage, and, knowing that they could neither read nor understand the English language, they depended on Schintz's explanations of the contents of the papers which he produced and destroyed in their presence, and paid him. The fact that Schintz declined to cancel and deliver to them the note and deed of trust on their request, but destroyed them instead, should have been sufficient to arouse their suspicions as to his good faith in the transaction and to put them on their guard. Ordinary care, under the circumstances, would have required them to procure some competent person to look into the matter for them. This they did not do, but relied wholly on the swindler who was then engaged in perpetrating the fraud. It is no answer to say that if Krasa had been so imposed on or had paid Schintz without taking up the securities, such payment, as between him and Schultz, in the absence of notice of the assignment, would have operated to discharge the lien, for, as before shown, appellees were not entitled to notice and they took the property subject to the encumbrance, and by their contract, in legal effect, agreed that it should stand as the primary fund in their hands for the payment of the mortgage debt. They were at their own peril bound to pay the debt to the one entitled to receive it. There was no proof that Schintz was the agent of Schultz, and their payment to Schintz was not good as to Schultz, Schintz's assignee, nor was it a compliance with their obligation to Krasa, who parted with his land upon the pledge that it should be held for the payment of his debt.

The judgment of the Appellate Court is reversed and the decree of the circuit court is affirmed.

Judgment reversed.

CARTWRIGHT and BOGGS, JJ., concur in the conclusion, only; HAND, J., dissenting.

THE PEOPLE *ex rel.* Felix F. Krause

v.

CARTER H. HARRISON *et al.**Opinion filed June 19, 1901—Rehearing denied October 8, 1901.*

191	257
195	*471
195	*478
191	257
f314	84
191	257
115a	*491

1. **STATUTES**—*statute should be construed so as to give effect to the main intent.* The several provisions of a statute should be construed together in the light of the general objects and purposes of the enactment and so as to give effect to the main intent, even though particular provisions are not construed literally.

2. **SAME**—*in construing a statute the court will have regard for contemporaneous conditions.* In determining the meaning of a statute the court will have regard to existing circumstances or contemporaneous conditions, and will also look to the objects sought to be obtained by the act and the necessity for its adoption.

3. **INTOXICATING LIQUORS**—*section 18 of Annexation act, preserving dram-shop ordinances, construed.* The provision of section 18 of the Annexation act, preserving in full force all ordinances of the annexed territory "whereby the licensing of dram-shops is prohibited or regulated," means all ordinances entitled "dram-shops," and which were enacted to license and regulate the sale of intoxicants.

4. **SAME**—*section 18 of Annexation act preserves in force all the Hyde Park liquor ordinances.* Under section 18 of the Annexation act all of the Hyde Park liquor ordinances in force at the time of the annexation of the village of Hyde Park to the city of Chicago are preserved in full force for all time to come, except as they may be changed in the manner provided in such section.

MAGRUDER, J., dissenting.

Harrison v. People ex rel. 92 Ill. App. 643, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

MORAN, MAYER & MEYER, for appellant:

At the time of the annexation of Hyde Park to the city of Chicago, June 29, 1889, the territory comprising the village of Hyde Park became subject to all existing and future ordinances of the city of Chicago, save only as the Hyde Park ordinance with reference to dram-

shops was continued in force by operation of said Annexation act. *Starr & Cur. Stat.* 797, 799; *McGurn v. Board of Education*, 133 Ill. 122; *People v. Cregier*, 138 id. 461; *Railway Co. v. Chicago*, 143 id. 641; *People v. Brown*, 83 id. 95; *Cicero v. Chicago*, 182 id. 301.

Only the provisions of the ordinance of the village of Hyde Park regulating and prohibiting the licensing of dram-shops were kept in force by the Annexation act. 1 *Starr & Cur. Stat. sec.* 18, p. 798; *Rev. Code of Chicago*, art. 3, chap. 39; *Rev. Mun. Code of Chicago*, sec. 1188.

A dram-shop or saloon is a place where spirituous or vinous or malt liquors are retailed in less quantities than one gallon. *Rev. Stat. chap.* 43, sec. 1; *Hyde Park Ordinance*, March 28, 1887, chap. 15, sec. 2.

A person who sells liquor in quantities of one gallon or more is a wholesale dealer, as contradistinguished from the keeper of a dram-shop or saloon. *Dennehy v. Chicago*, 120 Ill. 627; *Monmouth v. Popel*, 183 id. 634.

CHARLES M. WALKER, Corporation Counsel, and ROSWELL B. MASON, Assistant Corporation Counsel, (WALKER & PAYNE, and EDWIN BURRITT SMITH, of counsel,) for appellees:

Chapter 15 of the Revised Municipal Code of the village of Hyde Park, as amended May 8, 1889, and June 24, 1889, was kept in full force and effect by section 18 of the Annexation act. *Starr & Cur. Stat. sec.* 18, p. 805; *People v. Cregier*, 138 Ill. 401; *Swift v. Klein*, 163 id. 269; *People v. Harrison*, 185 id. 307.

The court will take into consideration the purpose for which section 18 of the Annexation act was passed, will consider the conditions prevailing at the time of its passage, and will give effect to its true intent and meaning, even if it were necessary to disregard the strict letter of the statute. *People v. Kipley*, 171 Ill. 44; *Hogan v. Akin*, 181 id. 448; *People v. Chicago*, 152 id. 546; *People v. Hoffman*, 97 id. 234; *Anderson v. Railroad Co.* 117 id. 26.

The court will not so construe a statute as to cause absurd consequences to follow. Interpretations that lead to an absurdity ought to be rejected. *People v. Marshall*, 6 Gilm. 672; *People v. Wren*, 4 Scam. 269; *People v. Chicago*, 152 Ill. 546; *Railway Co. v. Binkert*, 106 id. 298; *Perry County v. Jefferson County*, 94 id. 220; *People v. Gault*, 149 id. 39.

The sale of intoxicating liquor is not a right to be enjoyed by a citizen of the United States or a citizen of this State. By the public policy of this State the sale of intoxicating liquors is regarded as an evil, and all laws relating thereto as restrictive and to be favorably construed by the court. Rev. Stat. chap. 43; *People v. Cregier*, 138 Ill. 401; *Swift v. People*, 162 id. 534; *People v. Harrison*, 185 id. 307; *Crowley v. Christensen*, 137 U. S. 96; *Moore v. Indianapolis*, 120 Ind. 483.

The writ of *mandamus* is not a writ of right. It should not issue in doubtful cases. It will not be granted where it cannot be seen by the court that it will accomplish a good purpose or that it will have a beneficial effect. The court should be reluctant to coerce, by *mandamus*, the authorities of a municipality. *Swift v. Klein*, 163 Ill. 276; *Railway Co. v. County Clerk*, 74 id. 27; *Railroad Co. v. Suffern*, 129 id. 274; *Elgin Watch Case Co. v. Pearson*, 140 id. 423; *People v. Village of Crotty*, 93 id. 186; 19 Md. 351.

Per CURIAM: The Branch Appellate Court, in deciding this case, rendered the following opinion:

"This is an appeal from an order of the circuit court granting a peremptory writ of *mandamus* to compel the mayor and certain other officers of the city of Chicago to approve the relator's bond, and to sign and deliver a license to him, authorizing and permitting the said relator to sell and offer for sale within the city of Chicago, at his premises on Cottage Grove avenue, (within what is known as the 'prohibition district' of the former village of Hyde Park,) malt liquors in quantities of one gallon or more at a time, and there to carry on the business

of a wholesale malt liquor dealer. The petition for the writ set forth that the relator had resided in and carried on at the said premises, constituting a store or place of business, for more than seven years last past, a meat market and grocery business, and during said time was not a brewer or engaged in any other business except as aforesaid. No question is raised by appellant as to the sufficiency of the allegations of the petition to entitle the relator to the *mandamus* prayed for, if, under the law, he is entitled to a license at the place in which he conducts his business.

"The answer filed in behalf of the respondents raises no issue of fact, and the case was determined by the circuit court as a matter of law arising on the pleadings.

"It was recited in the decree or judgment of the court: 'The relator, and each of the respondents herein, by their respective counsel, having heretofore stipulated and agreed in open court that this cause should be heard by this court on the pleadings now on file and that no evidence shall be introduced on the hearing of this cause; that the material facts, as alleged in said petition, shall be taken as true, except that it is not admitted by the respondents that the ordinances, with their amendments, of the village of Hyde Park, set forth in the petition herein, are no longer in force and effect; and that the court, from the pleadings on file, shall determine, as a question of law, whether the relator is legally entitled to a writ of *mandamus* or whether the respondents are legally justified in refusing to grant the license, as prayed for in said petition.'

"The ordinance under which the relator applied for a license was passed by the city of Chicago, and approved April 9, 1897, being article 3, chapter 39, of the Revised Code of the city of Chicago.

"The village of Hyde Park was annexed to the city of Chicago June 29, 1889, under and in pursuance of an act of the General Assembly of the State to provide for

the annexation of cities, etc., commonly known as the 'Annexation act,' approved and in force April 25, 1889. Section 18 of that act is as follows: 'When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram-shops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram-shops, then such ordinance shall continue in full force and effect, notwithstanding such annexation: *Provided*, the city council or board of trustees, as the case may be, may, on petition of one-fourth of the voters of the territory over which said ordinance extends, submit at an annual municipal election, but not oftener than every other municipal election, the question to the voters of such territory whether or not an ordinance shall be passed authorizing the issuing of dram-shop licenses for such territory: *And provided further*, that upon petition in such case of one-fourth of the voters within any part of said annexed territory not less than one-half square mile in extent, asking that any such ordinance shall be continued in force in said portion of said annexed territory, said question of issuing dram-shop licenses shall be submitted separately to the voters of said portion of said annexed territory, and if a majority of the voters voting on such question vote against dram-shops, then said ordinance shall continue in force in said portion of said territory, otherwise not. The ballots cast at such election shall be written or printed, or partly written and partly printed, 'For Dram-shops,' or 'Against Dram-shops,' respectively, and shall be received, canvassed and returned the same as ballots cast at said election for municipal officers, and if it shall appear that a majority of the voters so voting upon the question vote 'For Dram-shops,'

then licenses may be issued for said territory on the same terms and conditions as licenses are granted by ordinance within other parts of the municipality. It is intended by this section to continue in full force and effect, all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram-shops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of the territory so affected consent, as hereby provided, to the repeal of such ordinance by the city, village or incorporated town to which the territory is annexed.'

"It is set up in the answer of the respondents that section 18 of the Annexation act was passed by the legislature with reference to the annexation of Hyde Park and the protection of its inhabitants in the security afforded to them by the liquor ordinance of that village. But it is in effect argued by the relator that by the terms of that act such ordinances were in fact impaired to the extent of preserving only the licensing, prohibiting and regulating of dram-shops, as such.

"At and before the time Hyde Park was annexed to Chicago there were in force in that village certain ordinances placing restrictions upon the liquor traffic within its boundaries. These are shown in chapter 15 of the Revised Municipal Code of the village (consisting of twenty-one sections) entitled 'Dram-shops,' and in two amendments thereto, which became laws on May 8, 1889, and June 24, 1889. This last amendment became a law only five days before annexation was accomplished. Without reproducing these several ordinances and amendments, it is enough to say of them that before the annexation of Hyde Park, and while they were unquestionably in force, it would not have been possible for a license such as is here involved to have been granted.

"The gist of the argument of the relator is based upon the proposition that only the provisions of the Hyde

Park ordinances prohibiting and regulating the licensing of dram-shops were kept in force by the Annexation act. We are free to admit that in the absence of countervailing legislation the ordinances of Chicago, upon the annexation of Hyde Park, *eo instanti*, of their own vigor, extended to and became operative over the annexed territory, and that from that instant the territory annexed became a constituent part of the city, and subject to the same laws, the same municipal organization and the same polity which the statutes in force had already provided for the government of the city and its institutions. (*McGurn v. Board of Education*, 133 Ill. 122; *People ex rel. v. Cregier*, 138 id. 401.) Of course, such being the law as to the extension of existing ordinances over annexed territory, subsequent ordinances of the city to which annexation has been made would have at least equal vigor over the annexed territory, in the absence of a statute saving to such territory the force of its own former ordinances.

"At the time Hyde Park was annexed there was in force in Chicago an ordinance of that city passed January 29, 1883, regulating the sale of ale, beer or other malt liquors in quantities in excess of one gallon at one time, and the contention of the relator is that that ordinance became at once operative in the annexed district of Hyde Park, and governed in that regard until the passage by the city of Chicago, on April 9, 1897, of an ordinance relating to the licensing of wholesale malt liquor dealers. That ordinance permitted the selling, by grocers, of malt liquors in quantities of one gallon or more at a time, they first having obtained a license therefor, and it is under that ordinance that the relator has asked for the *mandamus* in question. The question then recurs, did section 18 of the Annexation act keep in force the ordinances of Hyde Park relating to the subject in controversy?

"Coming to read the ordinance of Hyde Park, as embodied in chapter 15 of its Revised Code of 1887, and the ordinances amendatory thereof, it is apparent that the

whole subject of liquor traffic within the limits of that village was covered, and not merely the keeping of dram-shops. They provided for the creation of prohibition districts, (and the place in question is included therein,) within which no license for the keeping of a saloon or dram-shop could be granted, and prohibited the granting of licenses anywhere in Hyde Park for the sale of liquor in quantities less than four gallons in a single package, except at a regularly licensed saloon or dram-shop. They also provided for the licensing of wagons for the delivery of beer and other liquors in quantities not less than one gallon in a single package to one person. There are numerous other provisions not necessary to be mentioned. Now, is it reasonable to suppose that the legislature intended by section 18 of the Annexation act to sweep away all these provisions, except so far as the regulation and enforcing of the keeping of a saloon or dram-shop is concerned? That act was passed in April, 1889,—about two months before annexation took place. The amendatory ordinances of Hyde Park, which are of particular applicability to the subject, were passed May 8, 1889, and June 24, 1889. Annexation took place June 29, 1889.

“It appears by the answer of the respondents that the Annexation act ‘was passed by the legislature with reference to the ordinances of the village of Hyde Park, and more especially to chapter 15 of the Revised Municipal Code of the village of Hyde Park, 1887, as amended by the amendments of May 8, 1889, and June 24, 1889.’ The concluding part of said section 18, as before quoted, is as follows: ‘It is intended by this section to continue in full force and effect, all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram-shops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of the territory so affected consent, as hereby provided, to the repeal of such ordinance by the

city, village or incorporated town to which the territory is annexed.' The word 'whereby,' there employed, is not intended to limit the effect of the saving clause of the section to dram-shops, as such, alone, but means all ordinances entitled 'Dram-shops.' 'Dram-shops,' as used in that connection, is generic, and means the liquor traffic generally. Chapter 43 of the Revised Statutes is entitled 'Dram-shops,' and is a single chapter relating to the liquor traffic, generally. As used in that connection, the word includes in its meaning all matters there enacted with reference to licensing and regulating the evils arising from the sale of intoxicating liquors, as appears by the title of the act shown in the statute. (Hurd's Stat. 1899, chap. 43.) And so in the fore part of the section, the provision that 'such ordinance shall continue in full force and effect,' means the whole of the ordinance, and not a special section of it. In accordance with this view the Supreme Court, when considering the same section, said: 'It was expressly declared to be the intention of said section to continue in full force and effect all ordinances of any municipality, the whole or part of which should be annexed to the city, whereby the licensing of dram-shops was prohibited or regulated in the annexed territory, until the voters of the territory affected by the ordinance should consent to its repeal.' (*People ex rel. v. Cregier*, 138 Ill. 401.) In the same case (p. 423) the court holds that there is no possible ground for doubting the applicability of section 18 to the ordinances of Hyde Park in force at the time of the annexation, and that they were continued in force notwithstanding the annexation, and were placed beyond repeal by the city council of the city of Chicago. Any other holding by us than that the whole ordinance was meant by the statute would lead to absurd and most mischievous consequences.

"The answer of the respondents expressly set up that the statute was passed with reference to the annexation of Hyde Park. The purpose of the section being to se-

cure to Hyde Park its prohibition districts and to secure and regulate the liquor traffic within its territory, that object should be kept in mind, and words used in the statute should be construed liberally to that end.

"We are not without abundant authority on this question. The statutes of the State provide, with reference to the construction of the statutes: 'All general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried out.' (First paragraph of sec. 1, chap. 131.) So it is said in *People v. Wren*, 4 Scam. 269, (at p. 277): 'It is a well established rule in the construction of statutes, that where great inconvenience or absurd consequences are to result from a particular construction that construction should be avoided, unless the meaning of the legislature be plain and manifest.' In *People v. City of Chicago*, 152 Ill. 546, the rule is stated as follows: 'It may be well to here call attention to some of the rules which should influence the court in interpreting the statute now in question. The General Assembly, in the act revising the law in relation to the construction of the statutes, lays down as the first rule to be observed, the following: 'All general provisions, terms, phrases and expressions shall be liberally construed, in order that the true intent and meaning of the legislature may be fully carried out.' (2 Starr & Curtis, chap. 131, sec. 1.) A thing within the intention is regarded as within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention. (*Perry County v. Jefferson County*, 94 Ill. 214; *People v. Hoffman*, 97 id. 234; *Anderson v. Chicago, Burlington and Quincy Railroad Co.* 117 id. 26.) The several provisions of the statute should be construed together in the light of the general objects and purposes of the enactment, and so as to give effect to the main intent, although particular provisions are thus construed not according to their literal reading. (*Hill v. Harding*, 93 Ill. 77; *Wabash*,

St. Louis and Pacific Railway Co. v. Binkert, 106 id. 298.) The intention is to be gathered from the necessity or reason of the enactment, and the meaning of words enlarged or restricted according to the true intent. (*Castner v. Walrod*, 83 Ill. 171; *Cruse v. Aden*, 127 id. 231.) That which is implied is as much a part of the statute as that which is expressed. (Potter's Dwarries, 145; *United States v. Babbit*, 1 Black, 55.) When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity.—*Bryan v. Buckmaster*, Breese, 408; *People v. Marshall*, 1 Gilm. 672.' In *People v. Kipley*, 171 Ill. 44, (at p. 77,) the court says: 'In determining the meaning of a statute the court will have regard to existing circumstances or contemporaneous conditions, and also to the objects sought to be obtained by the statute and the necessity or want of necessity for its adoption.' The late expression of the Supreme Court in *Hogan v. Akin*, 181 Ill. 448, by Chief Justice CARTWRIGHT, is: 'It is true, we cannot disregard a provision of that kind appearing to be within the intention of the law-makers, but the purpose of construction is to find and give effect to such intention. * * * In seeking for such intention we are to consider not only the language used by the legislature, but also the evil to be remedied and the object to be attained.'

"There cannot, in our opinion, be any doubt it was the intention of the legislature, and of the lawfully constituted authorities of Hyde Park as well, that there should be preserved to the annexed territory all of the Hyde Park liquor ordinances in force at the time of annexation, for all time to come, except as they provide for a change therein, and that, as said in the *Oregier case*, *supra*, they were placed beyond repeal by the city of Chicago.

We agree with the contention of counsel for the relator that *mandamus* is a proper way to test the question, and was an appropriate remedy for the relator.

"The argument that the amendatory ordinance of Hyde Park, passed June 24, 1889, is void because of making an unjust discrimination between persons who may sell liquor in less quantities than four gallons in a package, does not seem to us to require particular answer. It deprives relator of nothing he asks for that he has an inherent right to.

"The judgment or order of the circuit court is reversed, with directions to dismiss relator's petition."

We concur in the foregoing views and in the conclusions above announced. Accordingly the judgment of the Branch Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER, dissenting:

I am unable to concur in this decision. The construction, which it gives to the act of the legislature of Illinois known as the "Annexation act," is strained and unnatural. The simple question in this case is: what kind of ordinances relating to the liquor traffic, which were in force in the village of Hyde Park at the time of its annexation to the city of Chicago, were continued in force after such annexation? This question is to be determined mainly by considering the language and terms of the Annexation act itself. That act was approved and went into force on April 25, 1889, and, under it, the village of Hyde Park was annexed to the city of Chicago on June 29, 1889.

Section 18 of the Annexation act of 1889 provides as follows: "When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram-shops

within said territory so annexed, or any part thereof, or, providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram-shops, then such ordinance shall continue in full force and effect, notwithstanding such annexation," etc. (1 Starr & Curt. Ann. Stat.—2d ed.—805.)

Manifestly, by the terms of section 18 as above quoted, the ordinances continued in force after annexation were ordinances prohibiting the issuing of licenses to keep dram-shops within the territory annexed. No other kind of ordinances were continued in force by the act. As if to emphasize the language above quoted from the first part of section 18 of the act, the last sentence of said section 18 declares more specifically the intention of the legislature by the use of the following words: "It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram-shops is prohibited or regulated within said city, village or incorporated town, or any part thereof," etc. (Ibid).

It could not be stated in terms plainer and clearer than the terms, above used, that the ordinances to be continued in force by the Annexation act were ordinances prohibiting or regulating the licensing of dram-shops.

What is a dram-shop? Section 1 of the act of 1874 in regard to "dram-shops" thus defines a dram-shop: "A dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon." (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1587). Section 2 of the revised municipal code of Hyde Park, adopted in 1887 and in force when the annexation of that village to the city of Chicago took place, adopts the same definition by the use of the following words: "A dram-shop or saloon is a place where spirituous, vinous or malt liquors

are retailed in less quantities than one gallon." Section 21 of said municipal code of Hyde Park provides that, within a certain territory described in that section, "no license shall be issued to keep a saloon or dram-shop."

Section 18 of the Annexation act is, therefore, to be read as though it provided for the continuance in force after annexation of ordinances, prohibiting the issuing of licenses to keep places where spirituous or vinous or malt liquors are retailed by less quantity than one gallon. The object of the *mandamus* in the present case is to compel the issuance of a license to the relator, authorizing him to sell and offer for sale malt liquors in quantities of one gallon or more. There is nothing in the terms of the Annexation act, under which the village of Hyde Park was annexed to the city of Chicago, which forbids the issuance of such a license to the relator.

This court has recognized in a number of cases the distinction between regulating the sales of liquors in dram-shops, where less quantities than one gallon may be sold, and regulating the sales of liquors in quantities above one gallon. (*Dennehy v. City of Chicago*, 120 Ill. 627; *City of Cairo v. Feuchter*, 159 id. 155; *City of Monmouth v. Popel*, 183 id. 634). An ordinance, regulating or prohibiting the licensing of dram-shops, necessarily regulates the sales of liquors in quantities of less than one gallon. Such an ordinance is not a regulation of the sale of liquors in quantities above one gallon.

This construction of the language of section 18 of the Annexation act was recognized and adopted by this court in the case of *People v. Cregier*, 138 Ill. 401, where it is said (p. 422): "It was expressly declared to be the intention of said section to continue in full force and effect all ordinances of any municipality, the whole or part of which should be annexed to the city, whereby the licensing of dram-shops was prohibited or regulated in the annexed territory, until the voters of the territory affected by the ordinance should consent to its repeal."

It is unnecessary to resort to established rules of construction, such as are referred to in the majority opinion, in order to determine the meaning of the word "dram-shop." That word has a well defined and well expressed meaning, given to it by the law itself. The statute defines a dram-shop to be a place where liquors are retailed in less quantities than one gallon, and a resort to rules of construction is unnecessary to determine the meaning of this definition. The Supreme Court of the United States has said that "the province of construction lies wholly within the domain of ambiguity." (*Hamilton v. Rathbone*, 175 U. S. 421). Where there is no uncertainty or ambiguity in a statute, there is no necessity for construction.

In *Ottawa Gaslight Co. v. Downey*, 127 Ill. 201, we said: "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as it is plainly written." The disregard by the court of an unambiguous word of a statute is an assumption of legislative power. There can be no departure from the plain meaning of a statute on the grounds of unwisdom or of public policy. (*Sedgwick on Statutes*, sec. 271; *United States v. Fisher*, 2 Branch, 399; *St. Paul Railway Co. v. Phelps*, 137 U. S. 528). We said in *Wunderle v. Wunderle*, 144 Ill. 40: "It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. * * * Where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature as manifestly disclosed by a consideration of the whole context."

To give to the words of section 18 of the Annexation act the construction that all ordinances of cities, towns and villages annexed thereunder, as well those prohibiting the issuing of licenses to sell and offer for sale malt liquors in quantities of one gallon or more as those prohibiting the issuing of licenses to keep places where

liquors are retailed in less quantities than one gallon, is to give to the words of the act a construction which is variant from their strict and literal meaning, and which is not justified upon the ground that it effectuates the intention of the legislature.

191	272
208	818

ISIDOR BERKENFIELD

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed June 19, 1901—Rehearing denied October 8, 1901.

1. **APPEALS AND ERRORS**—*when objection that grand jury was improperly constituted is not preserved on appeal.* An objection that the grand jury was irregularly constituted is not preserved for review, on appeal, by a motion to quash the indictment "because said indictment is wholly insufficient, in law, to require this defendant to plead thereto," since, to be available on appeal, the motion must specifically point out that the grand jury was not legally assembled.

2. **SAME**—*one cannot avail of error in his own favor.* That a judgment of conviction merely commits the accused to imprisonment in the county jail until his fine shall be satisfied at the rate provided, instead of requiring him to work out such fine, is an irregularity in favor of the accused, of which he cannot complain.

3. **CRIMINAL LAW**—*representation by partner as to firm's financial standing is within section 97 of Criminal Code.* A false written statement by one partner as to the financial standing of the firm, whereby the person extending credit on the faith of such statement is defrauded, is within the meaning of section 97 of the Criminal Code, providing for the punishment of a person who obtains credit by false representation in writing of "his own" financial standing.

4. **SAME**—*party may be imprisoned to satisfy fine after serving term fixed for punishment.* Under sections 168b and 452 of the Criminal Code a judgment convicting a person of a single offense for which both fine and imprisonment are imposed, may order that he be imprisoned, in case of failure to pay the fine, until the fine is paid or he is discharged according to law, such imprisonment to commence at the expiration of the term fixed as punishment for the crime.

5. **CONSTITUTIONAL LAW**—*act creating Branch Appellate Courts is constitutional.* Section 11 of article 6 of the constitution is authority for the act creating Branch Appellate Courts, and the judgments of such courts are therefore binding and valid.

Berkenfeld v. People, 92 Ill. App. 400, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Criminal Court of Cook county; the Hon. A. N. WATERMAN, Judge, presiding.

JAMES R. WARD, for appellant.

HOWLAND J. HAMLIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, MORITZ ROSENTHAL, and JOSEPH A. GRIFFIN, of counsel,) for the People.

Mr. JUSTICE HAND delivered the opinion of the court:

The defendant, Isidor Berkenfield, was indicted by the grand jury, at the January term, 1899, of the criminal court of Cook county, for obtaining credit from the Continental National Bank of Chicago by means of a certain false and fraudulent statement in writing signed by him as to the financial standing and responsibility of the firm of S. Levy & Co., of which firm he was a member, by means whereof said Continental National Bank was defrauded by said firm out of a large sum of money.

The indictment contained nine counts, the first, second, third and eighth of which were abandoned upon the trial, the prosecutor, under the direction of the court, having elected to proceed against the defendant only upon the fourth, fifth, sixth, seventh and ninth counts thereof, which counts were founded upon section 97 of the Criminal Code, (Hurd's Stat. 1899, chap. 38, p. 583,) which section reads as follows: "Whoever, by any false representation in writing, signed by him, of his own respectability, wealth, or mercantile correspondence or connections, obtains credit, and thereby defrauds any person of money, goods, chattels or any valuable thing, or whoever procures another to make a false report in writing, signed by the person making the same, of his honesty, wealth, mercantile correspondence or connections, and thus obtains credit, and thereby defrauds any

person of any money, goods, chattels or other valuable thing, shall be sentenced to return the money or property so fraudulently obtained, if it can be done, and shall be fined not exceeding \$2000, and confined in the county jail not exceeding one year." A motion to quash the indictment having been overruled, the defendant entered a plea of not guilty, whereupon a trial was had resulting in his conviction. A motion for a new trial and in arrest of judgment having been denied, the court rendered judgment upon said verdict, to reverse which the defendant sued out a writ of error from the Appellate Court for the First District, and said judgment having been affirmed by the Branch Appellate Court for said district, the defendant has brought the case to this court for further review.

It is first contented that the grand jury which found the indictment was not drawn and empaneled as required by law, and that such question is saved upon this record by the fourth ground of the motion to quash the indictment, which is as follows: "Because said indictment is wholly insufficient, in law, to require this defendant to plead thereto." We do not agree with such contention. Regardless of what the law may be in other jurisdictions, it is well settled in this State that an irregularity in the constitution of the grand jury is waived unless the defendant raise the question in apt time by a challenge to the array, or by motion to quash the indictment upon the ground that it was not found by a grand jury legally constituted. The motion to quash, in this case, is not sufficiently broad to raise such question. To be available here, such motion should have specifically pointed out to the court below that the indictment was found by a grand jury not legally assembled. (*Stone v. People*, 2 Scam. 326; *Williams v. People*, 54 Ill. 422; *Barron v. People*, 73 id. 256; *Gitchell v. People*, 146 id. 175; *Hagenow v. People*, 188 id. 545.) In the *Stone* case, on page 333, we say: "The question should have been presented to the circuit

court either on a challenge to the array of the grand jury or on a motion to have quashed the indictment for the reason that the indictment was found by a body not legally assembled." In the *Barron case*, on page 258, it is said: "The first point made is, that on the order for a special *venire* of twenty-three good and lawful men of Cook county to serve as grand jurors at that term but nineteen persons were returned, and therefore the body finding the indictment was illegally constituted and their act was without the authority of law. No objection to this mode of executing the *venire* was made in the court below in any form, and it is now too late to make it. The proper practice doubtless is, and such is the requirement of the statute and of this special *venire*, that twenty-three persons shall be summoned, but it is expressly provided that sixteen of them shall be sufficient to constitute the grand jury. An indictment found by a grand jury composed of nineteen persons would, after verdict, no objection having been made by motion to quash the indictment or by challenging the array, be a legal finding." And in the *Hagenow case* the record shows the grand jury to have been drawn and empaneled in the same manner in which it was drawn and empaneled in this case. On page 549 the court say: "No motion to quash the indictment was interposed, and no proof appears in the record, nor was any offered, so far as the record discloses, as to the manner in which the grand jury was selected. In *Gitchell v. People*, 146 Ill. 175, it is said (p. 186): 'As a general rule, pleading to an indictment admits its genuineness as a record. * * * After a party has pleaded to an indictment and been convicted, it is too late to object to the constitution of the grand jury.' * * * Authorities cited by counsel for plaintiff in error in support of the contention that an indictment found by a grand jury irregularly chosen is void, are all cases, so far as we have been able to examine them, where exception was regularly and specially made in apt time. The alleged irregularity in

the drawing and selection of the grand jury, as presented by the record, comes too late to be available as an objection."

It is next contended that the indictment in this case does not charge a criminal offense against the defendant, and it is, in effect, argued, that although said statement was false in fact and was made for the purpose of obtaining credit, and although said bank, relying thereon, extended credit to S. Levy & Co. and was defrauded, and although the defendant, as a member of said firm, participated in the fruits of said fraud, still no offense has been committed by him under said statute, as the words "his own," contained therein, are not sufficiently broad to include the partnership of S. Levy & Co., of which he was a member. The statement in writing counted upon in the indictment was signed, "S. Levy & Co.—By I. Berkenfield," of which firm the defendant was a member. The firm of S. Levy & Co. cannot be separated from the individuals who compose it. A representation of the defendant as to the financial standing of S. Levy & Co. was a representation as to the financial standing of the individuals composing said firm, of which he was one. If the members of the firm were solvent then the firm was solvent. The extension of credit to the firm was the extension of credit to the individual members thereof. There was no such person, either actual or artificial, in existence as S. Levy & Co., distinguished from S. Levy and Isidor Berkenfield. (*Meadowcroft v. People*, 163 Ill. 56.) The statement of the defendant, therefore, as to the financial standing of S. Levy & Co., was a statement of his own financial standing, and falls within the letter as well as the spirit of the statute. The indictment, therefore, sufficiently charged an offense against the defendant.

The defendant was sentenced to imprisonment in the county jail of Cook county for the period of one year and to pay a fine of \$1000 and the costs of the proceeding, and it was provided that if, at the expiration of said term

of imprisonment of one year, said fine and costs be not paid, he be confined in the county jail until such fine and costs were fully satisfied, at the rate of \$1.50 per day, or until he was otherwise discharged pursuant to law. It is insisted that such judgment and sentence are contrary to law, and void, for the reason that the court had no authority to order defendant to be confined in the county jail for a failure to pay the fine and costs, the imprisonment for such failure to commence at the expiration of the time of imprisonment imposed as a punishment for the offense itself, and for the further reason that the court had no authority to require said defendant to serve out said fine and costs at the rate of \$1.50 per day, unless sooner discharged by law.

Under an indictment charging a single offense upon a conviction for which both fine and imprisonment may be imposed, the court may properly order the defendant, for a failure to pay such fine and costs, to be imprisoned, such imprisonment to commence after the expiration of the term fixed as a punishment for the crime, otherwise the sentence of imprisonment and fine would be satisfied by imprisonment only. Section 452 of the Criminal Code (Hurd's Stat. 1899, chap. 38, p. 638,) is as follows: "When a fine is inflicted, the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law." Section 168b of the Criminal Code (Rev. Stat. 1899, chap. 38, p. 598,) is as follows: "That any person convicted of petit larceny, or any misdemeanor punishable under the laws of this State, in whole or in part, by fine may be required by the order of the courts of record, in which the conviction is had, to work out such fine and all costs in the workhouse of the city, town or county, or in the streets and alleys; of any city or town, or on the public roads in the county, under the proper person in charge of such workhouse, streets, alleys, or public roads, at the rate of one dollar

and fifty one-hundredth dollars (\$1.50) per day for each day's work."

Under the foregoing sections the court had power to commit the defendant to the county jail after the expiration of the time for which he was specifically sentenced, there to remain until such fine and the costs of this proceeding were paid, and that in default thereof he be required to work out such fine and costs in a workhouse, or upon the streets, alleys and public roads of the city, town or county wherein said conviction was had, at the rate of \$1.50 per day, unless he be otherwise discharged pursuant to law. The defendant was not required by the judgment of the court to work out his fine in a workhouse or upon the public streets, alleys or highways. In that regard the judgment and order of the court do not follow the statute. We think such omission immaterial, as the law is well settled that a defendant cannot take advantage of an error favorable to himself and by which he is not injured. The omission lessens the punishment of the defendant and is therefore not prejudicial to him. By the payment of the fine and costs the defendant could at any time after the expiration of one year regain his liberty. He was specifically sentenced to imprisonment for but one year, the remainder of the judgment being not as a punishment for the commission of a crime, but to enforce the payment of the fine and costs.

A number of exceptions were taken to the rulings of the trial court upon the evidence, which have been renewed here. We do not deem it necessary to take up and discuss each of said exceptions, as it would serve no useful purpose. Suffice it to say that they have all been carefully considered, and we have reached the conclusion that the court committed no reversible error in its rulings, either in the admission or rejection of evidence. The same may be said as to the instructions. We think the jury were fairly instructed as to the law of the case.

The evidence conclusively shows that the firm of S. Levy & Co. obtained credit of the Continental National Bank of Chicago to a large amount by reason of the false and fraudulent statement in writing made by the defendant to said bank of the financial standing of said firm of S. Levy & Co., of which he was a member, and that said bank was defrauded out of a large portion of the money which it was, by reason of said false statement, induced by the defendant to loan to said firm of S. Levy & Co. The contention, therefore, that the verdict is not supported by the evidence is not sustained by the record.

The argument of the defendant that the statute providing for the creation of Branch Appellate Courts (Hurd's Stat. 1899, p. 526,) is unconstitutional, and the judgments of such courts therefore void, is without force. While the Branch Appellate Courts are in a sense auxiliary to the Appellate Courts created by the act of 1877, (Hurd's Stat. 1899, p. 523,) they are Appellate Courts of uniform organization and jurisdiction, are created for certain well defined districts and have only appellate jurisdiction, which can be exercised in the manner alone provided by statute, and the judgments of which may be reviewed by this court upon appeal or writ of error. We are of the opinion ample authority is found in section 11 of article 6 of the constitution of 1870 to authorize the legislature to provide by statute for the creation of such Branch Appellate Courts, and that the judgment of the Branch Appellate Court for the First District affirming the judgment of conviction of the defendant by the criminal court of Cook county is a valid and binding judgment.

The judgment of said Appellate Court will therefore be affirmed.

Judgment affirmed.

JANNETT C. PYOTT

v.

JAMES M. PYOTT *et al.**Opinion filed June 19, 1901—Petition stricken from files October 4, 1901.*

1. PARTIES—*guardian of insane defendant may maintain cross-bill to annul marriage.* If the defendant to a bill for separate maintenance is insane, the guardian *ad litem* may maintain a cross-bill to annul the marriage upon the ground that it was void *ab initio*, for want of mental capacity on the part of his ward to enter into marriage.

2. JURISDICTION—*when court has jurisdiction to determine issue as to insanity of defendant.* If it is represented to the court that the defendant to a separate maintenance suit is insane, a guardian *ad litem* may be appointed, and if the insanity of the defendant at the time of the marriage is put in issue the court has jurisdiction to determine such issue without a jury.

3. CROSS-BILL—*when court may entertain cross-bill to annul marriage.* It is competent for the court, in a separate maintenance proceeding, to entertain a cross-bill to annul the marriage.

4. MARRIAGE—*when marriage is void ab initio.* A marriage is void *ab initio* where the mental faculties of the husband were so impaired that he was unable to understand the nature and effect of the act of marriage, and where he was subjected to improper influences exerted to the end that the conspirators might profit thereby.

Pyott v. Pyott, 90 Ill. App. 210, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

JAMES SMITH, for appellant.

R. M. WING, and JESSE COX, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant, on the 8th day of December, 1898, filed a bill in chancery in the circuit court of Cook county, in which she alleged that an agreement to enter into marriage was made by and between herself and one James M. Pyott, Sr., on the 14th day of October, 1898, and that

191 280
199 43
199 47

on the 20th day of October, 1898, they were lawfully married in the city of Chicago, and that they lived and cohabited together as husband and wife until the 21st day of November, 1898, and that on said last mentioned day said James M. Pyott, Sr., of his own wrong and without fault on her part, deserted and abandoned her, and she prayed for a decree under the provisions of the act in relation to married women, approved May 17, 1877, requiring the defendant, said James M. Pyott, Sr., to pay an amount, to be fixed by the court, for her reasonable support and maintenance while they should so live separate and apart.

It being represented to the court that said James M. Pyott, Sr., was insane, one James M. Pyott, Jr., his son, was appointed by the court as guardian *ad litem* and next friend of said James M. Pyott, Sr., and authorized to defend for the said James M. Pyott, Sr., and was also given leave to file a cross-bill in the cause for and in behalf of the said James M. Pyott, Sr. An answer and cross-bill were accordingly filed. The answer alleged, in substance, that at the time of the alleged promise to marry appellant, on the 14th day of October, 1898, and for a long time prior thereto, and also at the time said supposed marriage ceremony was performed, and for a long time prior thereto, James M. Pyott, Sr., was, and has ever since continued to be, not of sound mind and memory, but that, on the contrary, he was at said time seventy-two years of age and in his dotage, and his mind and memory were so impaired as to render him wholly incapable of entering into the contract of marriage, and that he was then, and is now, insane; that the said James M. Pyott, Sr., was the owner of property of the value of \$100,000; that he was a widower, his wife, with whom he had lived for more than forty years, having died about a year before the alleged marriage with the appellant; that appellant was a woman of bad moral character, lewd and unchaste and the mother of a bastard child, and had confederated

and combined with one Whiteford and one McMillan (all of whom were well aware of the irresponsible mental condition of said James M. Pyott, Sr.,) to entrap him into a marriage with appellant, out of mercenary motives; that said James M. Pyott, Sr., in his weak and enfeebled condition of mind, was induced by the fraudulent misrepresentations and practices of said appellant and her said confederates to submit to a clandestine marriage with the appellant; that he had not sufficient mental capacity to understand the nature and obligation of a marriage contract, and that such mental incapacity has from thenceforth continued and now exists, and that said alleged marriage with the appellant was a nullity. The cross-bill contained, in substance, the same allegations as were contained in the answer, and prayed that the alleged marriage contract and ceremony between said appellant and said James M. Pyott, Sr., should be annulled and declared by decree of the court to be null and void. Answer was filed to the cross-bill, and replication thereto, and replication was filed to the answer to the original bill.

The respective parties produced their testimony in open court and the issues were submitted to the chancellor. The court found "that at the time of the performance of said purported marriage ceremony the said James M. Pyott, Sr., was of the age of seventy-three years, and that at the time of said purported marriage ceremony, and for a long time prior thereto, the said James M. Pyott, Sr., was, and has ever since said time continued to be, insane and not of sound mind and memory; that the said James M. Pyott, Sr., was then in his dotage, and the mind and memory of said James M. Pyott, Sr., was so impaired as to render the said James M. Pyott, Sr., wholly incapable of entering into the marriage contract, and that said facts were at and before the time of said purported marriage ceremony known to the said complainant and cross-defendant, Jannett C. Patton, and to

one James C. Whiteford, in said cross-bill of complainant and hereinafter named, and that said purported marriage and marriage contract was and is therefore null and void and of no effect from the beginning,"—and entered a decree dismissing the original bill and granting the prayer of the cross-bill. The decree was affirmed by the Branch Appellate Court for the First District, on appeal. This is a further appeal to bring the proceeding into review in this court.

James M. Pyott, Sr., had reached the age of seventy-two years when the marriage ceremony was celebrated between him and the appellant. He was the father of five children, all of whom were then living and of mature age. He married the mother of these children in 1852 and lived happily with her until her death, which occurred October 27, 1897. For many years he was engaged in the foundry business in the city of Chicago, and had by the exercise of industry, energy and good business judgment acquired real and personal property of the value of perhaps \$200,000. The evidence preserved in the record abundantly established that as early as 1894 or 1895, though he retained his physical strength, there was a perceptible weakening or breaking down in his mental powers. About this time he began to neglect his business, and finally lost all interest therein and all desire to attempt to manage it. His mental infirmities grew more marked, until at the time of the death of his wife, in 1897, it was apparent to his family that he was afflicted with senile dementia,—a form of insanity in the aged. After the death of his wife the unsoundness of his mental faculties developed more rapidly. The advisability of instituting proceedings in court to have him declared mentally incompetent and to have a conservator appointed for him was seriously entertained by his children, but such course was not taken for the reason it was unpleasant to make the infirmity of their father thus a matter of public notoriety. His condition during the pe-

riod which intervened between the death of his wife and the alleged marriage with the appellant was the cause of much solicitude and humiliation to his children and immediate friends. The record contains many instances in his life and conduct during this period,—and, for that matter, to the very time of the hearing,—inconsistent with the view they proceeded from a sound mind, and attributable only to an impaired and enfeebled intellect. The incidents are so numerous we cannot undertake to reproduce them within the proper limits of an opinion. Brief reference to the following instances may be made: He was an active, capable business man, but became indifferent to his business affairs and declined to talk about them, and let others manage them as they chose. During former years he was a good conversationalist, but his conversation became rambling and nonsensical, and repetitions of what he had just said. He was a member of the church of long standing and a regular attendant at religious services, pronounced thanks at meals, advocated religious and moral principles and conduct, read only religious, scientific and useful books and periodicals or standard literature, abstained from vulgar or profane language, and was modest and delicate in deportment and dress. Among the changes in his life noticeable before the death of his wife were the refusal on his part to attend church services or to render thanks at his table; that he abandoned the books he had formerly enjoyed and began reading French novels containing stories that were suggestively immoral; he told indecent stories; indulged in profane and vulgar language, with little regard to the presence of women; neglected his clothing until he appeared dirty and indecent, and at one time appeared before visitors in his bare feet. He lived happily with his wife for many years and always displayed the greatest affection for her and the strongest desire to supply all her wants, until the decay of his mental powers set in. Then it was discovered that it

was unsafe to leave him in charge of his sick wife, for the reason he would not administer the medicines as directed, or could not be made to understand the importance of observing the directions as to what should be given her. While she was lying at the point of death he left her presence to make social calls, despite the pleadings of his children that he remain at her bedside; and while her corpse was still in their home he insisted that a relative should play a Scottish dance tune and jig music on a violin, and requested that a mourning dress of the kind that was being made for his daughter should be prepared for him. His mania soon developed a morbid propensity to matrimony. About three weeks before the ceremonies of marriage were pronounced between him and appellant he began to pay courtship to a servant girl in his family, and grew more and more demonstrative, and began to follow her from room to room in the family home, begging and imploring her to marry him. She knew of his mental infirmity and derangement and went to the home of his married daughter and told her of his conduct. When the servant and the daughter of Mr. Pyott, Sr., returned to his home they found him in the bed-room occupied by the servant girl. He was standing in the room entirely without clothing except a short undershirt. He greeted them with laughter and loud cries, and they became frightened and left him. He was afterwards found in the bed in the servant girl's room and was induced by his son-in-law to go into the library, where he indulged in dancing for a time. He persisted in forcing his attentions upon this servant girl until she became afraid of him and left the service of the family. He insisted that one or the other of his unmarried sons should take a wife, and when they refused he determined to procure some woman to serve as a house-keeper. He asked said Whiteford to recommend some one to him as a house-keeper, and Whiteford told him he knew of a widow living at Sedley, Indiana, who thought of coming

to the city to take a position of that kind in some family, and at his request Whiteford agreed to write to such widow. The communication between Whiteford and the widow he referred to, who proved to be the appellant and a niece of said Whiteford, resulted in an arrangement that Mr. Pyott, Sr., and Whiteford should go to Sedley on the 14th day of October, in order that he might see if he could engage the widow referred to, to serve him as house-keeper. They arrived at Sedley about the hour of eleven o'clock in the forenoon of the 14th, and went at once to the house of the appellant and remained there until about the hour of four o'clock in the afternoon of that day, when they returned to the city. The appellant testified that during the time they were at her house on that day said James M. Pyott, Sr., proposed marriage to her and that she accepted the proposal, and that it was agreed between them that she should come to Chicago on the 19th day of October,—five days thereafter. The only reference we find in his testimony to this alleged marriage engagement is this statement: "I knew when I was in Sedley that I was going to be married." Whiteford testified that while they were at lunch he was so "thunderstruck" by a remark of Mr. Pyott's to the appellant, his niece, which he (the witness) interpreted to be an offer of marriage, that he left the room; that when he returned to the room he heard a conversation between them amounting to a marriage engagement, and an agreement that his niece, the appellant, should come to Chicago on the 19th day of October, and that he and Mr. Pyott, Sr., should meet her at the depot. Appellant came to Chicago on the 19th, and on the next day, October 20, the marriage was celebrated at the house of one McMillan, in the city of Chicago. The appellant and Mr. Pyott, Sr., on the same day went to her home in Sedley. The children of Mr. Pyott, Sr., knew nothing of the matrimonial venture of their father until the notice of the marriage appeared in the public papers. The original

bill filed by the appellant charges that Mr. Pyott, Sr., abandoned her about the 21st day of November, 1898,—about four weeks after the alleged marriage. Mr. Pyott, Sr., was brought into court during the progress of the trial and was heard to testify by the chancellor.

It appeared the appellant was a niece of said Whiteford; that she was the mother of an illegitimate child,—a son,—then living, and that her character for chastity was not good when she resided in Chicago prior to going to Sedley. Other facts appearing in the evidence tended strongly to the conclusion the appellant led an unchaste life while she lived in Chicago, and also after the death of her husband, which occurred in Sedley some seven months, only, prior to her alleged marriage with Mr. Pyott, Sr. Whiteford knew that she had given birth to an illegitimate child, even if he knew no more as to her immoral conduct. He did not make this known to Mr. Pyott, Sr., but, on the contrary, falsely represented to him that she was a proper person for him to take for his wife, schemed to bring about the marriage and participated in concealing from the sons and daughter of Mr. Pyott, Sr., all knowledge that a marriage with appellant was contemplated, and intentionally aided in depriving Mr. Pyott, Sr., of the advice of his family as to the propriety of a marriage with the appellant. Whiteford had known Mr. Pyott, Sr., for some years somewhat intimately, knew he was possessed of considerable property and could not have been ignorant of the fact he was mentally unsound, and we think, with the chancellor, it was well established by the proof that the influence exerted by him over Mr. Pyott, Sr., which the latter in his weak and enfeebled mental condition was unable to resist, largely controlled the actions of Mr. Pyott, Sr., in the alleged matrimonial connections with the appellant, and that such influence was improperly exerted and exercised, and was attended with such circumstances of deception and evil intent as to amount to fraud.

We entertain no doubt, all of the evidence being considered, that the mental faculties of Mr. Pyott, Sr., had become so impaired and enfeebled that he was unable to understand the nature and effect of the act of marriage and to act rationally regarding the union with the appellant. Nor have we any doubt but that the insane impulses with which he was affected were subjected to improper influences exerted for the fraudulent purpose of inducing the celebration of the marriage, to the end that the conspirators might profit financially thereby. The evidence therefore warranted the finding that the marriage celebrated between the appellant and Mr. Pyott, Sr., was a nullity. 1 Bishop on Marriage and Divorce, 600; *Orchardson v. Cofield*, 171 Ill. 14; 14 Am. & Eng. Ency. of Law, (1st ed.) 489.

The doctrine that the right to sue for an absolute divorce is a personal right and requires the intelligent action of the injured party, and that for that reason the guardian or conservator of an insane person cannot maintain a suit for divorce for his ward, to which reference is made in *Iago v. Iago*, 168 Ill. 339, has no application to the decree rendered upon the cross-bill in this case. The cross-bill is not a bill for divorce, but a bill to annul a void marriage. A divorce suit is for the purpose of dissolving a marriage which the parties thereto had legal capacity to contract. A nullity suit has for its purpose a decree that a marriage which is void or voidable shall be judicially declared to be void. (14 Am. & Eng. Ency. of Law, 532, 533.) It is well settled the guardian of an insane person can maintain a bill in equity to have declared null the marriage of his ward on the ground of mental incapacity on the part of the ward to assent to the marriage. (7 Ency. of Pl. & Pr. 63, and cases cited in note; *Hancock v. Peaty*, 1 P. & D. L. R. 335; *Crump v. Morgan*, 3 Ired. Eq. 91; *Waymire v. Jutmore*, 22 Ohio St. 271; *Brown v. Westbrook*, 27 Ga. 102.) We need not pause to determine whether such a suit could be

maintained by a guardian or conservator to annul a marriage merely voidable, for the reason the marriage here under consideration was void *ab initio*.

It is urged with great earnestness that the circuit court, which rendered the decree, was without jurisdiction to adjudicate as to the insanity of said James M. Pyott, Sr. The position of counsel seems to be, the issue of insanity having been raised by the pleadings the circuit court should have suspended further proceedings, and directed an inquisition, in conformity to the common law or under the provisions of chapters 85 or 86 of the Revised Statutes of the State of Illinois, should be had and taken and the sanity of said Mr. Pyott, Sr., determined and the result certified to the circuit court, and that, at all events, it was essential the issue of insanity should have been submitted to and determined by a jury. After an inquisition and appointment of a conservator for an insane person under the statutory provisions on the subject, all suits and proceedings in behalf of the lunatic should be brought by the conservator, unless the interests of the conservator are adverse to those of his ward, or for other sufficient reason the court shall deem it better to appoint some other person as next friend to appear for, counsel, prosecute or defend for such insane person. (16 Am. & Eng. Ency. of Law,—2d ed.—p. 601; Hurd's Stat. 1899, chap. 86, sec. 13, p. 1132.) Before such inquisition, the rule which now obtains in both England and the United States is, that a lunatic may sue in his own name by some proper person appointed or recognized by the court as the next friend or guardian *ad litem* for the insane person. (16 Am. & Eng. Ency. of Law,—2d ed.—600.) When the mental capacity of a party to a proceeding arises for determination as an issue in a case in chancery, (other than bill to contest a will,) the better practice is to cause the question of sanity to be submitted to a jury for an advisory verdict; but the court is not without jurisdiction to hear and determine the question without a jury,

and even upon verdict rendered by a jury the court may decline to accept the finding of the jury and decide for itself the issue, upon the evidence presented in the case. (*Brown v. Miner*, 128 Ill. 148.) The statute controls the course to be pursued in a case in equity to contest a will, but in cases of that character the issue of insanity may, by agreement of parties, be determined by the court without the intervention of a jury. (*Whipple v. Eddy*, 161 Ill. 114.) It is entirely competent for the court, in a separate maintenance proceeding, to entertain a cross-bill for a decree annulling the marriage. (7 Ency. of Pl. & Pr. 99.)

It is not necessary we should refer to many other matters which have been argued in the brief of counsel, for the reason, the marriage in question being void, the other matters referred to become immaterial.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JOSEPH SALOMON *et al.*

v.

THE PEOPLE, for use of Jesse Holdom, Admr.

Opinion filed June 19, 1901—Rehearing denied October 8, 1901.

1. EXECUTORS AND ADMINISTRATORS—*what does not justify administrator's refusal to pay over funds.* If an administrator admits that a certain sum should be paid over by him to his successor, he can not justify his refusal to pay over the same by setting up a pending appeal by him from an order of court requiring him to pay over an additional amount.

2. SAME—*administrator's appointment cannot be questioned in a collateral proceeding.* If the court has jurisdiction of the subject matter and of the person its appointment of an administrator is not void, however erroneous it may be; and the legality of such appointment cannot be questioned in a suit on the bond of a former administrator for failure to turn over the funds to the administrator appointed as his successor.

Salomon v. People, 89 Ill. App. 374, affirmed.

191	290
e108a	452
191	290
e208	128
e208	184

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

LEON HORNSTEIN, (A. B. JENKS, of counsel,) for appellants.

BULKLEY, GRAY & MORE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from the judgment of the Appellate Court, affirming, after *remittitur*, a judgment of the circuit court of Cook county recovered by the People, for the use of Jesse Holdom, administrator of the estate of George Wincox, deceased, against appellants, on the bond of the appellant Joseph Salomon, as administrator to collect of said estate. The other defendants, McDonald and Moses Salomon, were the sureties on such bond. By his account filed in the probate court, said administrator to collect, Joseph Salomon, showed that he had received and collected \$29,857.02, but asked to be credited with disbursements of \$5030.65, leaving a balance in his hands of \$24,826.37. The probate court ordered said administrator to collect to pay over this balance to Jesse Holdom, as administrator of said estate, so appointed by a previous order of the court, and continued the hearing as to other items of the account until another day. Subsequently the probate court disallowed \$4715 of the credit claimed by Joseph Salomon in his account and charged the same against him, together with \$1477.06 for interest on the aggregate amount, and ordered the same to be paid to Holdom, as such administrator. From this subsequent order Salomon perfected an appeal to the circuit court, which appeal, at the commencement of this suit, was still pending. Joseph Salomon having refused, on demand of Holdom, to pay to him the \$24,826.37, the latter brought

this suit against him and his sureties on his bond, as before stated. The breach assigned in the declaration was, that said Joseph Salomon, as such administrator to collect, had neglected and refused to pay over to said Holdom, as such administrator, said sum of \$24,826.37, as ordered, or to pay the interest thereon, or twenty per cent of said amount in addition thereto, in accordance with the statute. It was one of the conditions of the bond, drawn in accordance with section 13 of the Administration act, that said Joseph Salomon should deliver to the person or persons authorized by the said probate court, as executors or administrators, to receive the same, all such goods, chattels and personal estate of the deceased as should come to his possession.

Several pleas were filed, but it is necessary to mention only such as appellants rely on here in support of their assignments of error to reverse the judgment.

Moses Salomon pleaded in abatement the pending of the appeal above mentioned from the order of the probate court charging him with said additional amounts of \$4715 and \$1477.06, averring that by reason of the premises it had not been determined and adjudicated what constitutes all the personal property of said estate which had come into Joseph Salomon's possession, and that until such adjudication he could not deliver to the person authorized to receive it, all such personal estate, in accordance with the condition of the obligation sued on. The court sustained a demurrer to this plea, and in so doing appellants contend there was error. The gist of the contention is, that by the condition of the bond and the provisions of section 17 of the Administration act, Joseph Salomon was bound to deliver to the person authorized by the court to receive it, *all* of the personal estate which had come into his possession,—not a part of it,—and that until it was finally determined what the total was, he was not required to deliver any part of it; that such final determination or adjudication could not

be had while the appeal as to a part of such estate was pending and undetermined. We cannot bring our minds in harmony with such a proposition. Joseph Salomon had not appealed from the order which required him to pay over the \$24,826.37, and this, with interest thereon and the statutory penalty of twenty per cent, was all that was sued for. He never denied his liability to account for and pay over to the proper person authorized, this amount, which was not only admitted but found by the court in proof, and the mere fact that he saw proper to contest the order requiring him to pay an additional amount would not operate to suspend payment of the first sum, nor the right of Holdom, as administrator, to sue for and recover it. The conditions of the bond do not support such a plea, and we know of no rule of law or reason which sustains it.

But the defense chiefly relied on was contained in other pleas filed, which set up, in part, the proceedings pending in the probate court when Holdom was appointed administrator, and the order by which he was so appointed, and averred that he was not, and never was, administrator of said estate nor duly appointed as such, and that Joseph Salomon, as administrator to collect, was not required by law to deliver said estate to him. The matter alleged in these pleas upon which the alleged conclusion rested that Holdom was not the administrator of the estate, was, that the deceased, George Wincox, left him surviving Jennie Wincox, his widow and only heir-at-law, and that before the alleged appointment of said Jesse Holdom she filed and presented to the court another petition for her own appointment, as widow of the deceased; that Holdom was not a creditor nor in any way related to the deceased and that no one had applied for his appointment, and that while said petitions of Jennie Wincox were pending and undetermined said probate court appointed said Holdom as such administrator. The plea then alleged that said appointment was void,

and that there was no legally appointed administrator to whom said Joseph Salomon, as administrator to collect, was bound to account or to deliver the estate in his hands.

The legal conclusion drawn by the pleader from the facts alleged in the plea can have no greater force than such facts legally warrant, and unless it follows, as a conclusion of law from the facts stated, that the appointment of Holdom was void, and not simply erroneous, such appointment cannot be attacked in this, a collateral, proceeding, and the demurrer was properly sustained, for the rule in this State is, as stated in the syllabus to *Wight v. Wallbaum*, 39 Ill. 554, that the probate court, having jurisdiction and being empowered to act, by granting or refusing to grant letters of administration, the person to whom such letters are granted becomes at least an administrator *de facto*, and the regularity of his appointment cannot be questioned in a collateral proceeding. On an application to revoke the letters, or on an appeal from the order granting the letters, all of the objections urged against their validity would be properly considered. (*Wight v. Wallbaum*, *supra*; *Schnell v. City of Chicago*, 38 Ill. 382; *Duffin v. Abbott*, 48 id. 17; *Shephard v. Rhodes*, 60 id. 301; *Hobson v. Ewan*, 62 id. 146; *Bostwick v. Skinner*, 80 id. 147; *Dodge v. Cole*, 97 id. 338; *Golder v. Bressler*, 105 id. 419; *People v. Salomon*, 184 id. 490.) Of course, to give the court jurisdiction there must be an estate, and the grant of letters of administration on a live man's estate is absolutely void. (*Thomas v. People*, 107 Ill. 517.) But if the court has jurisdiction of the subject matter and the person, the appointment is not void, however erroneous it may be. It follows that nothing alleged in these pleas constituted any defense to the suit.

The point most strenuously insisted upon is, that the record of the probate court given in evidence showed that prior to the appointment of Holdom an order had been made appointing the Equitable Trust Company administrator, upon said company filing its acceptance, but

no letters had been issued to it although it had filed its acceptance, and the record showed that the order of appointment had been vacated by the court. But whatever importance might, under proper pleading, be attached to such order of appointment, it can have no effect in the case, because it is not set up in the pleas under consideration. The question involved was raised by demurrer to the pleas, and they must stand or fall by their allegations.

Counsel cite *Munroe v. People*, 102 Ill. 406, in support of their contention that the court had no power to appoint Holdom. But in that case the court had assumed to remove an administratrix for a cause for which it had no power to remove her, and to appoint an administrator while the former was still acting as administratrix, and it was held that both the removal and the second appointment were absolutely void. It is sufficient to say that the pleas demurred to in this case show no such assumption of jurisdiction, beyond that conferred by the statute, as appeared in the case cited.

We are also referred to *Unknown Heirs of Langworthy v. Baker*, 23 Ill. 430. That, however, was a writ of error to reverse the judgment of the county court, and not a collateral attack, and it was suggested in *Schnell v. City of Chicago*, *supra*, that this court (Mr. Justice BREESE delivering the opinion in both cases) went too far in its language in the former case, and that it would have been "sufficient to say in the case, it being a direct proceeding to reverse the action of the county court, that the action of that court was not in conformity with the statute." Whether in the case at bar the appointment of Holdom was erroneous, under the statute, or not, it was not void, and the pleas were bad on demurrer.

The plaintiff was allowed a recovery of five per cent on the \$24,826.37 from the date of the demand by Holdom on the administrator to collect, but the Appellate Court held that the sureties were not liable for the penalty of twenty per cent prescribed by section 17 of the Adminis-

tration act, which had been included in the judgment of the circuit court, and required a *remittitur* of such penalty. The *remittitur* was made and the judgment was affirmed by the Appellate Court, and no question as to such penalty is raised in this court for our consideration.

Section 25 of the Administration act authorizes the suit and recovery of the judgment as affirmed in the Appellate Court, and we find no error to justify a reversal of the judgment.

Judgment affirmed.

OZRO G. AUGER *et al.*

v.

ROBERT L. TATHAM *et al.*

Opinion filed June 19, 1901—Rehearing denied October 8, 1901.

WILLS—when persons designated "*heirs-at-law*" do not take *per stirpes*. Under a will bequeathing to "the heirs-at-law of Lucy Auger, deceased," and other persons designated by name, "each the sum of twenty-five thousand (\$25,000) dollars," and a codicil increasing the bequests to "the heirs-at-law of Lucy Auger, deceased," and other named legatees, from \$25,000 "to the sum of \$50,000 each, said sum of \$50,000 to be paid to each of the persons named," the heirs-at-law of Lucy Auger, deceased, will take *per capita* and not *per stirpes*, where there is no latent ambiguity and nothing to indicate that the word "each" should be given less than its usual significance.

BOGGS, J., dissenting.

Auger v. Tatham, 92 Ill. App. 194, reversed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

SAMUEL W. NORTON, and JOHN S. MILLER, for plaintiffs in error:

In the construction of wills the intention of the testator is the criterion of interpretation; and this intention is to be ascertained from the language of the will itself,

—not from speculation of what the testator may be supposed to have intended. Schouler on Wills, (ed. of 1892,) par. 462; *Blatchford v. Newberry*, 99 Ill. 11; *Bingel v. Volz*, 142 id. 214; *Blanchard v. Maynard*, 103 id. 60; *Illinois Land Co. v. Bonner*, 75 id. 315.

In the case at bar the conditions as to family, property, degrees of relationship and friendship are similar to those presented in the per capita cases, in none of which have such considerations been given weight against the wording of the will. *Blackler v. Webb*, 2 P. Wms. 383; *Hyde v. Cullen*, 1 Jur. 100; *Payne v. Webb*, L. R. 19 Eq. 26; *Houghton v. Bell*, 23 Can. Sup. 498; *Richards v. Miller*, 62 Ill. 417; *Barber v. Railway Co.* 166 U. S. 83; *King v. Ackerman*, 2 Black, 408.

Where the will does not furnish the motive of the testator in the distribution of his estate the law does not permit the court to supply one. *Brownfield v. Wilson*, 78 Ill. 467; *Heuser v. Harris*, 42 id. 425; *Taubenhan v. Dunz*, 125 id. 524; *Nieman v. Schnitker*, 181 id. 400; *Condell v. Glover*, 56 Ill. App. 107; *Morgan v. Grand Prairie Seminary*, 70 id. 576.

The word "each" is the decisive controlling word in the clauses to be construed. Its force and effect is to distribute the group described as "the heirs-at-law of Lucy Auger, deceased," into individuals, as if each one were mentioned by name. 10 Am. & Eng. Ency. of Law, (2d ed.) 392; *Collins v. Prosser*, 3 D. & R. 112; *Middletown v. McCormick*, 3 N. J. L. 92; *Costigan v. Lunt*, 104 Mass. 217; *Martin v. Mercer University*, 98 Ga. 320; *Penny's Estate*, 159 Pa. St. 346.

Words in general are to be taken in their ordinary grammatical sense, unless a clear intention to use them in another can be ascertained. Jarman on Wills, rule 16; *Roberts v. Roberts*, 140 Ill. 345.

Where a gift is made to a number of individuals mentioned by name and a number of other individuals described as a class, those included within the class take as if each one were designated by name. *Blackler v. Webb*,

2 P. Wms. 383; *Payne v. Webb*, L. R. 19 Eq. 26; *Allender v. Keplinger*, 62 Md. 7; *Allen v. Allen*, 13 S. C. 512.

The words "the heirs-at-law of Lucy Auger, deceased," are words of description, only. They indicate the persons who are to take, but not the manner of taking. The persons so described, when ascertained, take as individuals. *Ward v. Stow*, 17 N. C. 509; *Dukes v. Faulk*, 37 S. C. 255; *DeCaumont v. Bogert*, 43 N.Y. Supp. 382; *Bisson v. Railway Co.* 143 N.Y. 125; *Walker v. Webster*, 95 Va. 377; *Bodine v. Brown*, 42 N.Y. Supp. 202; *Everett v. Carman*, 4 Redf. 341; *Best v. Farris*, 21 Ill. App. 49; *Copeland v. Copeland*, 64 id. 100; *McCartney v. Osburn*, 118 Ill. 403.

WILSON, MOORE & MCILVAINE, for defendants in error:

The "heirs-at-law of Lucy Auger" take as a class the same legacy as is given to the persons named in the seventh article of the will and the first article of the codicil. *Lachland's Heirs v. Downing's Exrs.* 11 B. Mon. 32; *Raymond v. Hillhouse*, 45 Conn. 467; *Howlett v. Howlett*, 12 Leigh, 350; *Gillion v. Underwood*, 3 Johns. Eq. 100; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Rex v. Williams*, 1 Dev. 3; *Spivey v. Spivey*, 2 Ired. 100; *Lyon v. Acker*, 33 Conn. 222; *Kelley v. Vigas*, 112 Ill. 242; *Rowland v. Gorsuch*, 2 Cox's Eq. 187; *Collier v. Collier*, 3 Rich. Eq. 555; *Balcum v. Haynes*, 96 Mass. 205; *Bassett v. Granger*, 100 id. 348; *Richards v. Miller*, 62 Ill. 417.

The beneficiaries are in the testator's mind, not as individuals, but as a body or class. *Vincent v. Newhouse*, 83 N. Y. 505.

When the word "heirs" is used in a will, and there are no other words to control the presumption, the legal inference is that it is *nomen collectivum*. *Clark v. Lynch*, 46 Barb. Ch. 68.

There is a broad distinction between the use of the word "children" and the word "heirs" in a will. When the latter word is used they take by representation, *per stirpes*. *Balcum v. Haynes*, 96 Mass. 205; *Kelley v. Vigas*, 112 Ill. 242; *Richards v. Miller*, 62 id. 417.

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in chancery to obtain a judicial construction of certain clauses in the will of Albert A. Munger, deceased. The testator made his will October 10, 1893, and a codicil thereto April 8, 1897, and died August 26, 1898. The estate devised amounted to \$2,500,000. The part of the will involved in this controversy provides as follows:

"Seventh—I hereby give and bequeath unto Alexander A. McKay, George A. McKay, Cornelia Thomas, Isadore G. Munger, the heirs-at-law of Lucy Auger, deceased, Arthur Munger, Gussie Munger Evans, Kate Munger Honn (sister of said Arthur Munger) and Charles Munger, son of Cheney Munger, each the sum of twenty-five thousand (\$25,000) dollars, to be paid to them, respectively, by my executors, after my decease.

"Eighth—All the rest, residue and remainder of my property, real, personal and mixed, of every kind and nature whatsoever and wherever situated, of which I shall die seized or possessed, or in or to which I shall have any right, title or interest at the time of my decease, I hereby give, devise and bequeath unto my cousins, Alexander A. McKay and George A. McKay, to have and to hold the same as their absolute and individual property, in fee simple, forever, share and share alike."

The codicil, omitting the formal introductory and concluding parts, is as follows:

"First—I hereby will and direct that the bequests to Cornelia Thomas, Isadore G. Munger, the heirs-at-law of Lucy Auger, deceased, Arthur Munger, Gussie Munger Evans, Kate Munger Honn and Charles Munger, made in and by item 7 of said original will, be increased from \$25,000, as therein provided, to the sum of \$50,000 each, said sum of \$50,000 to be paid to each of the persons named in this item 1 of this codicil in lieu of said sum of \$25,000, by my executors, as therein provided.

"*Second*—I hereby give and bequeath unto the heirs-at-law of Colby Munger, deceased, the sum of \$50,000, to be divided between and paid to the said legal heirs in equal portions, share and share alike, by my executors named in the said original will, as soon after my decease as practicable."

In construing the will the executors, who are the defendants in error here, contended that the seventh clause gave to the persons designated therein as "the heirs-at-law of Lucy Auger, deceased," as a class, the sum of \$25,000 to be divided among them, and that the first item of the codicil increased the bequest to the class to \$50,000. Ozro G. Auger and four other persons, plaintiffs in error here, who constitute "the heirs-at-law" named, contended that they were *each* entitled to the sum of \$25,000 under the plain language of the seventh clause of the will and \$50,000 *each* under the codicil. They filed a bill in the Cook circuit court praying that the will be construed in conformity to their contention, but it was dismissed for want of equity. The Appellate Court affirmed the decree below dismissing the bill, and plaintiffs in error bring the cause here by writ of error.

We think a decree should have been rendered according to the prayer of the bill. At the time the will was made Lucy Auger was dead, and a reference to her "heirs-at-law" was a reference to persons then definitely ascertained,—as much so as if they had been specifically named. The language of the seventh clause of the will undertakes to give to the several persons designated therein "each the sum of \$25,000." Upon what theory can it be urged that these persons shall, as a class, receive but the sum of \$25,000 under this clause? It can not be said that Ozro G. Auger and the others who make up the persons constituting the "heirs-at-law of Lucy Auger" are referred to with less singularity than are the other persons who are called by their christian names. The word "each," in its common acceptation, refers singly

to the individuals designated in the clause, and to say that each of the persons who are the heirs of Lucy Auger, deceased, is not individually designated, is, we think, to put a limited interpretation upon the word "each" as it is commonly used.

Counsel for defendants in error cite many cases to support their theory that the designation of "heirs-at-law of Lucy Auger, deceased," means a class who take *per stirpes*. Each of the cases cited differs materially from the one under consideration. If the language of the instrument, in its common acceptation, is clear and unambiguous, the intention of the testator as therein expressed must control. As is said in *Boyd v. Strahan*, 36 Ill. 355 (on p. 359): "There is no other class of written instruments known to the law in which so little importance is to be attached to the technical sense of language in comparison with that sense in which the apparent object of the writer indicates his words to have been used. So far is this principle carried, that the court say in 3 Wils. 141: 'Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.' This language is quoted approvingly by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 80."

Among the cases cited and relied upon by defendants in error in support of their construction of this will are *Richards v. Miller*, 62 Ill. 417, and *Kelley v. Vigas*, 112 id. 242. The first case was a devise of the residue of an estate to the testatrix's "heirs-at-law." The husband of the testatrix being an heir, it was contended that he took a part only equal in amount to that of the other persons who were her heirs, while the law gave him, as her heir, a greater portion. The court there said (p. 425): "In the case before us there are no words indicating equality

of division. The gift is to a particular class. We must invoke the aid of the statute to determine the persons who constitute the class. When invoked to ascertain the persons to take, we must follow its provisions as to the quantity they shall take,"—and the estate was given to the "heirs" *per stirpes*. The principle of that case is very different from this. Here there are words indicating an equality of distribution, while there the opposite was expressly found. Furthermore, a devise to the heirs of a third person, without reference to the quantity each should take, would, under the authority of this case, mean a devise to them *per stirpes*, or in the same proportion the statute would cast it upon them; but where the quantity is expressly designated, as so much for each person who comes within the term "heir," a very different case arises. Nor is the *Kelley case*, *supra*, like this in fact or principle. There the devise of a remainder was to the testator's "heirs-at-law." From the context of the will, so expressly found by the court, it appeared that the intention of the testator was to make the gift *per stirpes* to his heirs. True, the statute is resorted to to determine who are the heirs of Lucy Auger; but in the face of the language giving to "each" of them a specific sum we can not resort to the statute to determine the quantity they would take, as to do so would defeat the expressed intention of the testator in that respect. (*Allen v. Allen*, 13 S. C. 512). In this case we look to the statute, only, to determine who are the heirs of Lucy Auger. The quantity they shall take is not left open to us as a question of legal construction.

In the case of *McCartney v. Osburn*, 118 Ill. 403, a devise to the heirs of a person was held to mean the children of such person, and it was there said (p. 425): "It is conceded, and such is unquestionably the law, that if a testamentary gift be made to one person and the children of another person, as, for instance, to A and the children of B, A and the children of B, in such case, in the absence

of anything to show a contrary intention, will take *per capita* and not *per stirpes*. (2 Jarman on Wills, 756.) Yet it is equally well settled that the opposite construction will prevail when the intention to that effect can be gathered from the context, or, in the somewhat quaint language of Jarman: "This mode of construction will yield to a very faint glimpse of a different intention in the context." In other words, the rule there announced is, that a gift to A and the heirs of B (where the heirs are definitely ascertained) is a gift to them *per capita*, unless a contrary intention appears. The cases relied upon by defendants in error are those of devises which contain other words, or show a state of facts which control or overturn the natural presumption arising from the plain words used.

The question then is, does the whole instrument here under consideration, construed together, contain anything tending to indicate that the word "each" refers to the "heirs-at-law of Lucy Auger, deceased," as a class, rather than to the several individuals constituting the heirs? Or, in other words, is there anything to indicate that the word "each" shall be given less than its usual signification?

It is contended, inasmuch as the second item of the codicil gave "to the heirs of Colby Munger, deceased, the sum of \$50,000" to be "divided between them," (Colby Munger being the first cousin of the testator,) that this indicates an intention upon the part of the testator to give to the "heirs-at-law of Lucy Auger, deceased," only a like sum to be divided among them, she being also a first cousin. We think it cannot be fairly said the language imports such an intention. On the contrary, does it not plainly indicate the opposite intention? By item 2 of the codicil the testator demonstrated that he fully understood how to make a bequest to a *class* of heirs, "to be divided between them," and had he desired to make such a bequest to the plaintiffs in error as a class he certainly

would have done so. The construction which we have placed upon the will is further fortified by the language of the testator in the codicil, in which he says, "said sum of \$50,000 to be paid to each of the *persons* named in this item 1 of this codicil." The word "persons," as here used, manifestly refers to individuals, and not to a class.

The inference that it was evidently the testator's intention to give to the heirs of a deceased cousin only the same amount he would have given to her had she been living, finds no support in the facts and circumstances of this case. The testator had no descendants as his heirs, his cousins being the nearest of his relations. He discriminates between them in making his gifts. Two of his cousins he makes his residuary legatees. To several others he gives \$50,000 each and to others nothing, and this discrimination cannot be interpreted otherwise than as in furtherance of a definite plan and purpose in the mind of the testator. There were ample funds on hand to pay all the legacies, construing the seventh clause as we have done,—that is, that each of the heirs of Lucy Auger is entitled to \$50,000. Had there been a shortage in any of the bequests this would have disclosed a latent ambiguity in the will, and that fact might be considered as tending to support the contention of defendants in error. But the will is free from latent ambiguities. The surrounding facts and circumstances fail to disclose anything not in harmony with the construction which we have placed upon the seventh clause of the will and the first item of the codicil.

The judgment of the Appellate Court taxing costs against the executors was right, but its judgment affirming the decree of the circuit court dismissing the bill is erroneous and must be reversed. The cause will be remanded to the circuit court, with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded.

MR. JUSTICE BOGGS: I do not concur.

THOMAS HUBER *et al.*

v.

EDWIN J. HESS.

191 805
114a *126

Opinion filed June 19, 1901—Rehearing denied October 9, 1901.

1. **MORTGAGES**—*redemption by judgment creditor passes title to judgment debtor's property, only.* Where two lots covered by the same mortgage become the property of different persons prior to the foreclosure of the mortgage and the sale *en masse* of both lots, a judgment creditor of one, only, of such owners, who after twelve months makes redemption *en masse* of both lots, acquires title only to the lot owned by his judgment debtor.

2. **SAME**—*to entitle one to contribution for redemption, equities of the parties must be equal.* To entitle the owner of one lot to contribution from the owner of another lot for redemption from a mortgage covering both properties the equities of the parties must be equal, since if there was any obligation resting upon the person who made redemption to discharge the debt as his own he can claim nothing from the other, even though the latter is benefited by the redemption.

3. **SAME**—*when judgment creditor is not entitled to contribution for redemption.* Where two lots are mortgaged by a testator, but by his will he devises one lot to his son and the other to his daughter, accompanying the devise to the daughter with the condition that she pay the full amount of the encumbrance on both lots, the lot so devised to her is primarily liable for the encumbrance; and if both lots are sold *en masse* on foreclosure, and after twelve months a judgment creditor of the daughter alone makes redemption of both lots, he acquires no right of contribution as to the lot owned by the son, where the bill for foreclosure and the decree both recite the provisions and conditions of the will, which is also on record.

4. **JUDICIAL SALES**—*purchaser is chargeable with notice of facts disclosed by the record.* A party purchasing at a judicial sale is charged with notice of such material facts as are disclosed by the record of the proceedings under which he derives title, and he will be presumed to have examined the same before he became a purchaser.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is an appeal by the appellants, Thomas Huber, Mary T. Huber, his wife, and K. G. Schmidt Brewing Company, a corporation, from a decree rendered by the circuit court of Cook county on December 12, 1900, upon the

application of appellee, Edwin J. Hess, filed on August 24, 1900, under the Torrens law, to register the title in himself to lots 10 and 11 in Hapgood & Barry's subdivision of the north half of block 24, in the canal trustees' subdivision, in section 33, township 40 north, range 14, east of the third principal meridian, in Chicago, Cook county, Illinois. Appellee's application alleged, that he was the owner in fee simple of both of the lots, and that the Hubers and Maria A. Schumacher and her husband, Friederich Schumacher, were the only persons interested in the property other than appellee, and that they were only so interested as tenants at the sufferance of appellee.

The appellants, Thomas Huber and Mary T. Huber, filed an answer, denying that appellee was the owner in fee simple of lot 11, and alleging that they were the owners in fee simple absolute of lot 11. The appellant, K. G. Schmidt Brewing Company, filed its answer denying that appellee owned any interest in said lot 11, and alleged that Thomas Huber was the owner in fee of said lot 11, and set up certain judgments obtained by it against Thomas Huber and his wife, and also set forth in detail the proceedings under which appellee claims title.

The examiner found in his report, that, at the time of the filing of the application, the appellee was the owner in fee simple of said lot 10, and that the same was occupied by Friederich Schumacher and Maria Anna Schumacher as tenants at will under appellee; but the examiner found that appellee had not such title to said lot 11 as to warrant registration thereof. Objections to the examiner's report were filed on December 3, 1900, by the appellee.

On December 3, 1900, the court below entered a decree, decreeing title to said lot 10 in appellee in fee simple, and directing the registrar of titles to register such title; but ordered that the case, so far as it related to lot 11, should be continued for further hearing. On December 12, 1900, the court entered a decree, decreeing that the

title to said lot 11 in fee simple is vested in the appellant, Thomas Huber, subject to the liens therein declared to exist, and that appellee, Hess, was not entitled to the registration of the said lot 11, but further decreed that appellee, Hess, by reason of his having redeemed lot 11 from the foreclosure sale hereinafter mentioned, became subrogated to the rights of the purchaser, or assignee of the purchaser, at the foreclosure sale to the extent of said Hess having a first lien on lot 11 for re-imbursement of the redemption money, in the proportion of the relative value of said lot 11 to the value of the said lot 10; that lot 11 on the day of redemption, to-wit: June 28, 1900, became subject to the said lien, because of said redemption *en masse*, for the payment to said Hess of such proportion of the whole of said redemption money, paid by said Hess, as the value of said lot 11 bore to the value of both said lots 10 and 11 on June 28, 1900; that is to say, said Huber should contribute such sum to said Hess towards the re-payment of said sum of \$5540.51 hereinafter mentioned in the true proportion that the value of said lot 11 bore to the value of both said lots 10 and 11 on June 28, 1900. It was further therein decreed, that Hess has a first lien for such sum of money on said lot 11, which is prior to any other lien or charge, provided that the amount of said lien should not be satisfied out of any other property of said Huber than said lot 11; also that the inchoate right of dower of Mary T. Huber, and the rights of homestead of said Hubers in lot 11 were subject to the lien in favor of the appellee; and that the judgments of said K. G. Schmidt Brewing Company were liens on said lot 11 subject to the lien in favor of the appellee.

The facts, as shown by the pleadings, the testimony taken, the report of the examiner, and the decree of the court, are substantially as follows: On July 20, 1890, one Maria Anna Huber was the owner of said lots 10 and 11. Lot 11 was a corner lot improved by a frame building, and lot 10 was an inside lot adjoining said lot 11, and

was improved by a brick building. On said July 20, 1890, Maria Anna Huber, then a widow, gave a trust deed, waiving homestead, to one Joseph H. Ernst, trustee, conveying said lots 10 and 11 to secure her note for \$3500.00, payable four years after date, with interest at six per cent per annum. The maturity of the loan was subsequently extended until June 20, 1898. On March 1, 1895, Maria Anna Huber died testate, leaving her surviving Thomas Huber and Maria Anna Schumacher, her children and Michael Huber and Thomas Huber, her grandchildren. Her will was dated December 16, 1893, and was admitted to probate on March 12, 1895, in the probate court of Cook county.

By her will Maria Anna Huber gave and bequeathed to her son, Thomas Huber, said lot 11, together with the frame buildings thereon, and to his heirs and assigns forever, but upon the express condition that he, or his heirs and assigns, should pay the sum of \$1000.00 to Michael Huber, his heirs and assigns, the bequest of said \$1000.00 to said Michael Huber having been thereinbefore made. By her will said testatrix gave, devised and bequeathed to her daughter, Maria A. Rick, since become Maria Anna Schumacher, the wife of Friederich Schumacher, said lot 10, together with the brick building situated thereon, said gift, devise and bequest of said lot 10 being followed by these words: "This bequest is made upon the express condition that said Maria A. Rick shall pay the full amount of the encumbrance upon said lots 10 and 11, in Hapgood & Barry's subdivision aforesaid, viz.: the sum of \$3500.00 principal and all unpaid interest; said encumbrance is secured by trust deed upon both of said lots; and upon the further condition that said Maria A. Rick shall pay the sum of \$1000.00 to her grandson, Thomas Huber, his heirs and assigns, being the bequest hereinbefore made to said Thomas Huber."

On October 20, 1898, Andrew J. Ernst filed a bill in the superior court of Cook county to foreclose said trust deed,

securing the said note of \$3500.00, making as parties defendant thereto Maria Anna Schumacher and her husband, Thomas Huber and his wife, and the K. G. Schmidt Brewing Company, and others. On April 20, 1899, said lots 10 and 11 were sold, under the decree in such foreclosure suit, *en masse* to Joseph H. Ernst for \$4951.87. The decree of sale, which had theretofore been entered on March 20, 1899, ordered that the master should first offer for sale said lot 10. No redemption was made from this foreclosure sale either by Thomas Huber or by Maria Anna Schumacher.

On June 28, 1900, the appellee, Hess, recovered a judgment in the circuit court of Cook county against Maria Anna Schumacher and Friederich Schumacher for \$2100.00, and costs. Under said judgment, appellee, Hess, redeemed said lots 10 and 11 from said foreclosure sale, and, by virtue of said redemption, said lots were sold by the sheriff to appellee, Hess, on July 24, 1900, for the amount of the redemption money, and costs; and, thereupon, a sheriff's deed was issued to said appellee, Hess, conveying both said lots. The amount deposited with the sheriff by appellee to effect such redemption was the sum of \$5541.51, including taxes and interest. Before said sale by the sheriff, appellee caused an execution to issue out of said circuit court on said judgment against the Schumachers, and placed the same in the hands of the sheriff, who levied the same upon said lots 10 and 11.

Prior thereto, and on September 24, 1896, K. G. Schmidt Brewing Company recovered a judgment against Thomas Huber for \$1047.30, upon which execution was issued and returned unsatisfied. Said brewing company also recovered another judgment against said Huber on July 25, 1900, for the sum of \$1289.17 and costs. Both of the said judgments are wholly unpaid. Said lot 11 is now occupied by Thomas Huber claiming to be the owner thereof.

On January 11, 1898, an agreement was entered into between Thomas Huber, of the first part, and Maria Anna

Schumacher and her husband, of the second part, by the terms of which Huber agreed to convey to the Schumachers lots 30 and 31 in block 11 in Hosmer & Mackey's subdivision, subject to a trust deed to Joseph H. Ernst securing \$500.00 which the Schumachers assumed and agreed to pay; and Huber also agreed to pay the Schumachers \$100.00 as additional consideration; and thereby the Schumachers agreed to convey to Huber said lot 10 subject to the payment of the trust deed to Ernst securing the said indebtedness of \$3500.00, and also subject to certain judgments and trust deeds against the Schumachers, aggregating, with said trust deed to Ernst, about \$6400.00. By the terms thereof each party was to provide for the use of the other, within a reasonable time, proper abstracts of title to the properties to be conveyed; also by the terms of the agreement all deeds were to be passed, and the negotiations to be closed, within a reasonable time from the date of the agreement; and time was thereby declared to be the essence of the agreement.

When lots 10 and 11 were sold *en masse* to Joseph H. Ernst, the master executed to said Ernst a purchaser's certificate of purchase of the two lots, and recorded the same. Subsequently, the report of sale was approved and confirmed by the superior court, and thereafter said Ernst assigned said certificate to one George W. Kellner.

WINSTON & MEAGHER, (EDWARD S. WHITNEY, of counsel,) for appellants.

E. F. HERRMANN, and J. KENT GREEN, for appellee:

Appellee was a creditor authorized to redeem under the statute. Rev. Stat. chap. 77, sec. 20.

The right to redeem carries with it the right to purchase and obtain legal title. Whoever has a right to redeem may purchase and receive title at the redemption sale of property redeemed. *Oldfield v. Eulert*, 148 Ill. 620.

Appellee became substituted, in equity, in place of the holder of the certificate of purchase. 2 Wiltzie on

Mortgage Foreclosure, (Kerr's Suppl.) sec. 962; *Ebert v. Gerding*, 116 Ill. 216; *Ogle v. Koerner*, 140 id. 170; *Schroeder v. Bauer*, id. 135; *Hough v. Insurance Co.* 57 id. 318; *Young v. Morgan*, 89 id. 199; *Beaver v. Slanker*, 94 id. 175; *Bank v. Bierstadt*, 168 id. 618.

The lien of the sale redeemed from is the lien that is enforced, which wipes out all subsequent estates, even though the redeeming creditor has no execution against the person holding such subject estates. The former owner of the equity of redemption has no right to be heard after twelve months' redemption period has expired. *Oldfield v. Eulert*, 148 Ill. 614; *Fitch v. Wetherbee*, 110 id. 475; *Lamb v. Richards*, 43 id. 312; *Massey v. Westcott*, 40 id. 160; *Moore v. Hopkins*, 93 id. 505; *Smith v. Mace*, 137 id. 68; *Breedlove v. Austin*, 146 Ind. 694; *Pearson v. Pearson*, 131 Ill. 464; *Herdman v. Cooper*, 138 id. 583; *Patterson v. Rosenthal*, 117 Ind. 831.

None but joint judgment creditors can in equity object to appellee's redemption. *Fischer v. Eslaman*, 68 Ill. 82.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Upon this record two questions are presented for our consideration: *First*, did appellee, by the statutory proceedings set forth in the statement preceding this opinion, acquire the title to lot 11? *Second*, if appellee did not so acquire title by such proceedings, did he become entitled thereby to any equitable rights of contribution or subrogation against lot 11? The court below by its decree answered the first question in the negative, and the second question in the affirmative. The appellants claim that, by the redemption and execution sale, the appellee obtained no right, title or interest, legal or equitable, against said lot 11, and no right of contribution or subrogation against appellant, Thomas Huber. Appellee claims that, by said redemption and execution sale, he became invested with the title in fee simple absolute to

said lot 11, but that, if he is not the owner of lot 11, he is entitled to a lien thereon for contribution, as found by the decree of the court below in his favor.

First—There seems to be no contest in this case as to lot 10. The court below decreed title to lot 10 in appellee in fee simple, and directed the registrar of titles to register such title; and the action of the court below in this regard is not complained of. The contest between the parties is wholly as to lot 11.

The trust deed, executed in her lifetime on July 20, 1890, by Maria Anna Huber, covered both lots 10 and 11. Upon the foreclosure of said trust deed both lots were sold to Joseph H. Ernst, and a certificate of sale or purchase covering both lots was issued to him. Twelve months passed after the foreclosure sale, which took place on April 20, 1899, without any redemption of the premises, either by Maria Anna Schumacher, or by Thomas Huber. The judgment in favor of the appellee, rendered on June 28, 1900, a little over fourteen months from the date of the foreclosure sale, was not a judgment against Thomas Huber, but a judgment against Maria Anna Schumacher and Friederich Schumacher. Under the will of Maria Anna Huber, Mrs. Schumacher was devisee of lot 10 alone, lot 11 having been devised to Thomas Huber. Appellee, under a judgment and execution sale against the owners of lot 10 alone, made a redemption of both lots 10 and 11 from the foreclosure sale.

Although, when the trust deed securing the \$3500.00 was first made, Maria Anna Huber was sole owner of both lots 10 and 11, yet, when the foreclosure took place after her death, the ownership by the terms of her will had become severed, so that lot 10, subject to the condition hereinafter mentioned, was owned by Mrs. Schumacher, and lot 11 by Thomas Huber. Thus, there were then two separate owners of the lots covered by the trust deed.

In *Fischer v. Eslaman*, 68 Ill. 78, it was held that, where the land owned by two as tenants in common, is sold on

foreclosure of a mortgage given by them, a sale, under a redemption made by a judgment creditor of one of them, will pass the title of that one only; and that, where the land of A and B, owned by them as tenants in common, is sold upon foreclosure of a mortgage given by them, and, after the expiration of twelve months, is redeemed by a judgment creditor of A, and a deed made to the creditor, the latter will acquire no title to the interest of B. In *Fischer v. Eslaman*, *supra*, Patience A. Champion deeded the property there in question to Ralls and Pensoneau, who on the same day mortgaged the property back to her; judgments were then recovered against Ralls by Fischer and others; the mortgagee then foreclosed her mortgage and bought in the entire property at foreclosure sale; executions were taken out on these judgments of Fischer and others; plaintiffs therein paid to the sheriff money sufficient to redeem from the foreclosure sale; the executions were levied on the entire property, and it was sold to Fischer at sheriff's sale, and the sheriff's deed was issued to him; under such a state of facts, we held that, by this redemption and sale, Fischer had prior title to the undivided half interest of Ralls, his execution debtor alone, but that, as against the interest of Pensoneau, the other tenant in common, Fischer had only an equitable claim for contribution. In that case we said (p. 83): "Conceding that it was necessary to pay the entire amount due to Mrs. Champion in order to effect a redemption, so as to reach Ralls' interest, it does not follow that this conferred a right to treat Pensoneau, or those claiming in his right, as judgment debtors to those who only had judgments against Ralls. Undoubtedly, in such case, those redeeming would have an equitable claim against the Pensoneau interest, but it would have to be enforced in a court of equity, and not in a court of law upon the trial of an ejectment, claiming the fee to the land. It was held by this court, in *Titsworth v. Stout*, 49 Ill. 78, that, where one tenant in common removes an

encumbrance from the common estate, the other tenants must contribute to the extent of their respective interests; and, to secure such contribution, a court of equity will enforce upon such interests an equitable lien of the same character with that which has been removed by the redeeming tenant; and the principle would seem to be equally applicable to the judgment creditor of a tenant in common." The right to equitable contribution was held in the *Fischer case* to be enforceable only in a court of equity; and this right may be enforced, whether the owners of the property are tenants in common of one lot, or owners in severalty of two lots, covered by the same mortgage. A court of equity has equal power to establish and enforce the right of contribution in the one case, as well as in the other. The only difference between the two cases would be that, in the one case, the amount of contribution must be arrived at by computation, and in the other by the relative values of the lots.

"In those cases where one of several owners redeems the mortgaged premises, he thereby becomes substituted, in equity, in the place of the mortgagee, and is entitled to hold the land as if the mortgage existed, until the other owners re-pay to him their shares of the encumbrance; he in effect becomes the assignee of the mortgagee, for the purpose of enabling him to obtain the whole title to the land, if the other owners decline to contribute their respective shares towards the removal of the encumbrance." (Kerr's Supplement to Wiltsie on Mortgage Foreclosures, sec. 962.) Under the doctrine laid down in *Fischer v. Eslaman*, *supra*, appellee was not, as to Thomas Huber, a redemption creditor. As only a judgment creditor has the right to redeem, there can be no redeeming creditor who is not a judgment creditor. The appellee was a judgment creditor of the Schumachers, but, so far as the record discloses, of no one else. As was well said in the *Fischer case*: "It surely could not be supposed that, because a party had a judgment against

a particular individual, he thereby became a judgment creditor of any and everybody else whose property had been sold at master's or sheriff's sales, and had not been redeemed within twelve months; and yet this is the only hypothesis upon which these parties can be called redeeming creditors as to Pensoneau's [Huber's] interest." It was further said in the *Fischer case*: "The right to redeem from sheriff's and master's sales, after the expiration of twelve months and before the expiration of fifteen months from the day of sale, is alone derived from the statute, and it is, by it, limited to judgment creditors." Inasmuch, therefore, as appellee, Hess, had no judgment against Huber, he was not a judgment creditor, so far as Huber's interest in lot 11 was concerned, and acquired no right to have it sold by the mere act of paying money into the hands of the sheriff to redeem from the master's sale. The fact, that he had a judgment against the Schumachers, gave him no more right to acquire title to Huber's interest in lot 11, than it did to that of anybody else against whom appellee had no judgment.

We are, therefore, of the opinion that the court below decided correctly in decreeing that the title to lot 11 in fee simple was vested in the appellant, Huber, and that the appellee was not entitled to registration of the title to lot 11.

Second—Did appellee, who thus acquired no title to lot 11, become entitled, by the redemption of both lots 10 and 11, to an equitable right of contribution or subrogation against lot 11 devised under the will to Thomas Huber? It is contended on behalf of appellee that, if he redeemed lot 11 belonging to the appellant, Thomas Huber, from the foreclosure sale, and by such redemption acquired no legal title to lot 11, he should have a right of contribution against the latter lot, so as to secure a re-imbursement of the redemption money in the proportion of the relative value of lot 11 to the value of lot 10; and that, under the doctrine of *Fischer v. Esla-*

man, supra, he would be entitled to a lien on lot 11 for such re-imbursement.

Appellants, however, contend that appellee, Hess, is not entitled to a lien for re-imbursement or contribution against lot 11, for the alleged reason that lot 10 was primarily liable for the payment of the whole encumbrance resting upon both lots 10 and 11. This contention grows out of the character of the devise of lot 10 to Maria Anna Schumacher. Maria Anna Huber devised lot 10 to her daughter, Mrs. Schumacher, and accompanied the devise or bequest with the condition that Mrs. Schumacher should pay the full amount of the encumbrance on said lots 10 and 11. It is claimed that, had Mrs. Schumacher paid the Ernst trust deed or redeemed from the foreclosure sale, she would not have been entitled to subrogation or contribution against the Huber lot, and that the equitable rights in this regard of appellee, as judgment creditor, are no greater than those of Mrs. Schumacher, as judgment debtor.

The doctrine, invoked by the appellants upon this branch of the case, is stated as follows: "When the estates of two persons are subject to a common mortgage, which one of them pays for the benefit of both, he has a right to hold the whole estate thus redeemed until the other party shall pay an equitable proportion of the sum paid to redeem; or the party who has paid the encumbrance may in equity enforce contribution from the other. But to entitle one to contribution from the other, their equities must be equal. If there was any obligation resting upon the person who paid the encumbrance to discharge it as a debt of his own, he can, of course, claim nothing from the other, although the latter was benefited by the payment. * * * The test, by which the right to contribution, is always determined is found in the inquiry, whether the equities of the parties are equal; if they are equal, the right to contribution exists; but if they are not equal, it does not exist." (2 Jones on Mort-

gages,—5th ed.—sec. 1089). It is said, in the present case, that the equities of Mrs. Schumacher and her brother, Thomas Huber, are not equal. The claim of appellants is, that, inasmuch as Mrs. Schumacher took lot 10 under the will subject to the condition that she should pay off the mortgage upon both lots 10 and 11, she was under obligation to discharge the whole encumbrance upon both lots as a debt of her own, and that the appellee, as her judgment creditor, levying upon her interest in lot 10, occupies the same position in this respect as Mrs. Schumacher herself. (*In re Dunlop*, L. R. Ch. Div. 583; *Butte v. Cunnyngame*, 2 Russ. 279; *Vogle v. Brown*, 120 Ill. 338; *Moore v. Shurtleff*, 128 Ill. 370). It is conceded that, so far as the mortgagee was concerned, both lots 10 and 11 were pledged to the payment of the mortgage debt, and both Mrs. Schumacher and Thomas Huber were equally under obligations to the mortgagee to pay the debt, but, it is insisted that, as between Mrs. Schumacher and Thomas Huber, lot 10 was the primary fund, out of which the mortgage should have been paid, and lot 11 was only secondarily liable therefor. The superior court, in its decree of foreclosure, recognized the primary liability of lot 10 by providing, that that lot should be first offered for sale to satisfy the amount found due by the decree to the mortgagee.

We are inclined to think that the contention of the appellants in this regard is correct. It makes no difference whether the condition, attached to the devise of lot 10, be construed as a condition precedent, a condition subsequent, or simply as a charge or lien. Appellee was chargeable with knowledge of the condition, on which the title of his judgment debtor, Mrs. Schumacher, to lot 10, was based. The condition, as set forth in the will, was in the direct chain of appellee's title. The will was of record in the probate court of Cook county. The contents of the will and the condition in question were fully set up in the foreclosure bill filed by the mortgagee,

Ernst. The condition is also specifically recited in the decree of foreclosure under which the sale, from which appellee redeemed, was made. A party purchasing at a judicial sale is charged with notice of such material facts, as the record of the proceedings, under which he derives title, discloses, and he will be presumed to have examined the same before becoming a purchaser. (*Webber v. Clark*, 136 Ill. 256). It also appears that, when the sheriff made the sale under the judgment of appellee, the appellant, Thomas Huber, gave notice, express and public, that the purchaser at the sale would acquire no right, title or interest, legal or equitable, in or to lot 11, and would be held and considered as a trespasser upon the rights of Thomas Huber.

So far as the contract of January 11, 1898, was concerned, that contract appears to have been abandoned by both parties. Neither party sought to enforce it against the other, nor was anything done under it. The deeds, provided for by its terms, were to pass, and the negotiations therein provided for were to be closed, within a reasonable time; and such reasonable time had long since elapsed before the redemption here under consideration took place.

It is clear, that appellee's judgment debtor, Mrs. Schumacher, did not own lot 10 absolutely, but owned it subject to the condition already specified. As the condition was annexed to the estate as part of the tenure, it would of course affect the land into whatever hands it might pass. (6 Am. & Eng. Ency. of Law,—2d ed.—p. 505; *Hogebloom v. Hall*, 24 Wend. 148; *Taylor v. Sutton*, 15 Ga. 103).

We are, therefore, of the opinion that the court below erred in holding that appellee had a right of contribution as against lot 11 or its owner, Thomas Huber.

Accordingly, the decree of the circuit court is reversed and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WILLIS H. BALLANCE

v.

LOUIS C. VANUXEM *et al.**Opinion filed June 19, 1901—Rehearing denied October 8, 1901.*

CONTRACTS—to authorize termination, default need not be such as to defeat whole purpose of contract. In order to authorize one party to a contract who is not in default to terminate the contract for default of the other party it is not necessary that such default be of a character to defeat the whole purpose of the contract, but it is sufficient if the default would render further performance a thing different, in substance, from what was contracted for.

Ballance v. Vanuxem, 90 Ill. App. 232, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

CHAMBERLAIN & RICE, and CHURCH, McMURDY & SHERMAN, for appellant.

JOSEPH CUMMINS, and HENRY A. GARDNER, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellees recovered a judgment in the circuit court of Cook county against appellant in an action of assumpsit brought by them on a written contract executed by them and appellant. The Appellate Court affirmed the judgment, and appellant took this his further appeal to this court.

By agreement in the trial court a jury was waived, and the issues were submitted to the court for trial.

The contract was made on May 1, 1889, and by it the appellees, who were the general agents of the New York Life Insurance Company for the State of Illinois, appointed appellant, Ballance, agent of the company in

upwards of twenty-two counties in Central Illinois, with headquarters at Peoria, and with the title of general manager of the Central Illinois agency. By its terms the contract was to continue in force one year unless it should be terminated by mutual consent or by a violation of its terms and conditions or failure to comply therewith, in which event all moneys due by either party were to become immediately due and payable. The appellant was to appoint sub-agents and canvass the district thoroughly, and obtain applications for insurance in said company, collect and pay over the premiums, and perform such duties as should be required of him by such general agents in said business and be governed by their instructions. His compensation was to be a single brokerage commission of sixty per cent, graded, upon original first year's premiums which should be collected by him and paid over in cash to appellees, as such general agents. The contract also provided for certain bonuses to be paid to appellant upon his writing one million or one million and a half of insurance, but as no such amount was written this part of the contract need not be further stated. By the contract appellees agreed to advance to appellant \$625 semi-monthly on account of the compensation to be paid to him personally,—that is, on all of the sixty per cent not paid to sub-agents and any bonus he might be entitled to; also \$33.33 monthly for office expenses and clerk hire, which \$33.33 balance was to be re-paid if the second year premiums should not be paid on at least \$1,250,000 of insurance obtained by him. It also provided that all collections made by said Ballance should be paid over immediately to appellees or to the company, or in accordance with instructions; that all moneys or securities received or collected under the contract should be held by appellant in trust and used by him for no purpose whatever, but to be reported, held and transmitted to appellees or to the company, in accordance with instructions, but that appellees could off-

set against any of appellant's claims under the contract any debts due from him to appellees. Out of the sixty per cent commissions, graded, appellant was authorized to pay to sub-agents employed by him fifty-five per cent of first premiums received on policies written by them, but the balance, and all other moneys received by him on account of such insurance, were to be immediately paid over as above stated. Appellant gave the bond required by the contract and entered upon his work under the contract, and succeeded in obtaining, before the cancellation of the contract by the appellees on October 22, 1889, a large amount of insurance for the company, but not sufficient to entitle him to any of the bonuses mentioned in the agreement. Appellees remitted to appellant prior to the cancellation of the contract a total of \$6250 of the semi-monthly advances they agreed to make, which, as we understand the contract, lacked but one of such advances so agreed to be made in that period of time; but as the decision of the Appellate Court is final as to all controverted questions of fact, it is not material that such facts be stated *in extenso*. Controversies arose between the parties, and appellant withheld premiums collected by him and failed to report or to remit them to appellees. He also failed to make reports to them of a considerable number of policies which had been sent to him for delivery to the assured, although appellees wrote him repeatedly demanding such reports and remittances and that he should comply with the contract in this regard. Appellant failing to comply, the appellees, on October 22, 1890, wrote him that because of his failure to comply with the terms and conditions of the contract said contract was terminated, and that they would commence suit immediately to recover the indebtedness due them on account of his breach of the agreement. This suit followed, and appellant, with his plea of non-assumpsit, filed his notice of special defenses relied on, claiming damages, exceeding plaintiffs' demand, for breach of

contract on their part, viz.: First, that plaintiffs did not allow him the exclusive use of the district, as they had contracted, but appointed other agents in the same; second, that they did not supply him with suitable blank applications for policies, and other necessary blanks; third, did not provide him with a book-keeper, as they had agreed; fourth, did not advance to him, as agreed, \$625 semi-monthly during the term of the contract, but only ten of such semi-monthly payments, and many of those not at the times agreed upon; fifth, did not advance him, monthly, the \$83.33 for office rent during the period of the contract. There were other minor specifications not necessary to mention. The issues thus made were, after hearing the evidence, found for the plaintiffs, and the affirmance by the Appellate Court of the judgment rendered on such findings is as conclusive upon the parties and upon this court, as to all controverted questions of fact, as if the trial had been by a jury. We need not, therefore, follow counsel in their arguments upon the facts any further than a proper consideration of the questions of law raised may require.

At the close of the evidence the court refused to hold as law in the decision of the case, as requested by the defendant, that upon the whole evidence the plaintiffs were not entitled to recover. We have carefully read the evidence and the arguments of counsel, and are of the opinion that there was sufficient evidence to sustain the findings of the court and that it was not error to refuse to hold the proposition in question. The principal question was, of course, whether or not the plaintiffs had the right to rescind the contract and to recover the balance due them for advances, etc. The court held as law in the case the proposition of defendant below that the covenants in the contract of the respective parties were mutual and dependent covenants, those of each forming the consideration for those of the other, and that neither party who was in default in any material respect would

have the right to terminate the contract for the default of the other party; and the court further held, for the defendant, that if the act of the plaintiffs in terminating the contract was wrongful, then they were not entitled to a return of the moneys advanced to the defendant under the contract. But the court refused to hold this proposition asked by the defendant:

"The plaintiffs had no right to abandon or terminate the contract with the defendant because of a default by the latter in the performance of some covenant or covenants, unless the default were of such a nature as to defeat the whole purpose of the contract."

And such refusal is assigned as error. In considering this branch of the case we shall assume, as the evidence tends to prove, that appellant was in default, and had failed, without sufficient cause, to comply with his contract in matters which were of the substance of the contract, but that his default, although persisted in against the remonstrances of appellees, was not of such a nature as to defeat the whole purpose of the contract.

Appellant's contention is, that the failure of Ballance to comply with the contract must have been total to authorize a rescission by appellees, and in support of the proposition *Selby v. Hutchinson*, 4 Gilm. 319, and other cases containing similar language, are cited. The gist of the decision, as applicable to the facts in that case, is contained in the following language used in the opinion (p. 332): "For partial derelictions, and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself." True, it was also said that "in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated, or rendered unattainable by his misconduct or default." But in *Leopold v. Salkey*,

89 Ill. 412, this court said (p. 422): "The general remark made by the court [quoting it as above] is not understood as laying down the rule that to justify an abandonment of a contract the opposite party must have failed to discharge every obligation imposed on him, but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different, in substance, from what was contracted for, do not authorize an abandonment of the contract, for when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different, in substance, from what was contracted for, so far as we are advised the authorities all agree the party not in default may abandon the contract." (See, also, *Lake Shore and Michigan Southern Railway Co. v. Richards*, 152 Ill. 59). As applied to the case at bar we are of the opinion the court properly refused to hold as law in the decision of the case the proposition as presented; that it was not necessary that the appellant's default should be "of such a nature as to defeat the whole purpose of the contract," to entitle the appellees to terminate it.

It is to be implied from the contract itself that it might be terminated by mutual consent or by failure to comply with its provisions, and that upon such termination all moneys due under it to either party from the other should become immediately payable. But the chief defense relied on is, that appellees were themselves in default, and did not remit to appellant the semi-monthly advances and the money for office rent, and furnish appellant with a book-keeper, as they had agreed by the contract, but only complied in part with their agreement in this respect, and that, being in default themselves, they could not terminate the contract because of appellant's default. Inasmuch as the facts have been conclusively found against appellant on this branch of the case, and as the court held as law in the decision of the case

the proposition presented by appellant applicable thereto, no question of law is left for us except the one presented by the proposition that upon the whole evidence the plaintiffs were not entitled to recover,—and that we have already considered.

Complaint is made, however, that the court improperly modified two of the defendant's propositions, and then held them, thus modified, as law in the decision of the case. These propositions, as modified and held, did not announce or apply any rule of law harmful to appellant's defense. By the terms of the contract it was agreed that the agents in said district already under contract with appellees should be the subordinate agents of appellant, to be paid by him out of, but not to exceed, his sixty per cent, and that all insurance in the district for said company should be effected through him, under his contract. Appellant contended that appellees had an agent,—one Smith,—in the district under a contract of earlier date than his own, who contracted insurance for them on his own account without any information having been given to him of such contract, and that they thereby perpetrated a fraud on appellant which precluded recovery by them. There was a conflict in the evidence as to the extent of the information given appellant by appellees, at or before executing their contract, in respect to the character or terms of Smith's contract, but, as on other questions of fact, the finding was against appellant. As applicable to this question the court held a proposition as law in the case that it was the duty of the plaintiffs, before making the contract with defendant, to inform him of the existence and character of Smith's contract, and that if they failed to do so it was a fraud on him which would preclude recovery by them in the action.

Complaint is made that the court refused to hold as law another proposition presented on this question, but the court had held all that was necessary in the propo-

sition above mentioned, and which embraced all that was important in the one refused. No error of law was committed.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

191	826
108a	4 22

THE CANAL COMMISSIONERS

v.

THE SANITARY DISTRICT OF CHICAGO.

Opinion filed June 19, 1901—Rehearing denied October 9, 1901.

1. APPEALS AND ERRORS—*appeal lies to Supreme Court if the State is interested.* Section 88 of the Practice act, providing that appeals from circuit courts in all cases in which the State is interested, as a party or otherwise, shall be taken directly to the Supreme Court, was not repealed by implication by the amendment of section 8 of the Appellate Court act. (Laws of 1887, p. 156.)

2. SAME—*State is interested in suits relating to the Illinois and Michigan canal.* The State is interested in suits by or against the commissioners of the Illinois and Michigan canal, concerning property and interests of the same, since the commissioners act in their official capacity for the State, which owns and maintains the canal.

3. SPECIFIC PERFORMANCE—*right to specific performance is not absolute.* A court of equity decrees the specific performance of a contract when by that means it can accomplish more perfect and complete justice than can be attained by an action at law; but the right to specific performance is not absolute, as is the right to recover damages at law.

4. SAME—*contract must be perfectly fair, equal and just to be specifically enforced.* Although a contract may be legal and enforceable, it must be perfectly fair, equal and just, and such as a court of equity will commend, in order to justify a decree of specific performance.

5. SAME—*specific performance will not be decreed if a legal remedy is adequate.* While there are numerous conditions under which a party to a contract will not be permitted to elect to pay damages rather than perform the contract, yet specific performance will only be decreed where the legal remedy or compensatory damages fail to do complete justice between the litigating parties.

6. SAME—*contract of December 21, 1899, between canal commissioners and sanitary district not capable of specific enforcement.* The contract

of December 21, 1899, between the canal commissioners and the sanitary district, by which the sanitary district agreed to maintain a certain depth of water in the summit level of the Illinois and Michigan canal, cannot be specifically enforced, since to do so would be to compel the sanitary district to confer a benefit upon the canal, in addition to compensating for any injury to it.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

H. M. SNAPP, and C. B. GARNSEY, for appellants.

RUNNELLS & BURRY, and P. C. HALEY, (JAMES TODD, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The Illinois and Michigan canal, extending from the Chicago river to Peru, was constructed by the State of Illinois and is managed by the appellants as a board appointed by the Governor. In 1889 the act authorizing the formation of sanitary districts was passed, and the appellee, the Sanitary District of Chicago, was organized under said act. It has constructed a drainage channel from said Chicago river to Lockport. This suit arises out of a contract between the canal commissioners and the sanitary district by which the sanitary district agreed to supply water to the canal. Some statement of the nature and history of the two enterprises, as shown by the evidence, seems to be necessary to an understanding of the questions at issue.

The canal was opened for business in the year 1848. The first level of the canal leading from Chicago was constructed so that the water therein was about eight feet above Lake Michigan when the latter stood at what is known as "datum," which is the low-water mark in Lake Michigan in the year 1847. This first or upper level of the canal is also called the "summit level," and

extends from Bridgeport, where the canal connects with the Chicago river, at a point about five miles from Lake Michigan, south-westerly about twenty-eight miles, terminating in a lock called "Jack's lock," about two miles north of Lockport, where the canal takes a new and lower level. To supply the canal with water a dam was built across the Calumet river at Blue Island and a channel was cut from thence to the canal. As a further source of supply a feeder from the Desplaines river was provided, and pumping works were erected at Bridgeport to pump water from the Chicago river into the canal. These pumps were used during the dry season of the year. The canal has a slope of one-tenth of a foot to the mile from Bridgeport to Lockport, so that the surface is about three feet lower at Lockport than at Bridgeport. To maintain this level a constant supply of water is required. As the city of Chicago grew and turned sewage into the Chicago river the city became interested in having more water pumped out of said river into the canal, to induce a flow from Lake Michigan into the river instead of allowing the sewage to be carried out into the lake, where the city obtained its water supply. Consequently, in 1858 new and larger pumps were put in at Bridgeport, pumping over 20,000 cubic feet per minute, and the cost of the new pumps and of operating them was divided between the city of Chicago and the canal trustees. The city continued to grow and to discharge more sewage into the river, and in 1865 the legislature authorized it to deepen this summit level of the canal to cleanse and purify the river by drawing a sufficient quantity of water from Lake Michigan through it and through the summit level of the canal to carry the river water and sewage away by means of the canal. The city was to have a lien upon the canal, and the deep cut was completed in 1871, and after the Chicago fire the city was reimbursed for the expenditure. For a number of years after the deep cut was completed there was a sufficient depth of water in the canal from

gravity flow to answer the needs of navigation without pumping. The dam across the Calumet at Blue Island was then removed. In 1883 it had again become necessary for the city to pump from the Chicago river, and it established pumps at Bridgeport which pumped from 40,000 to 50,000 cubic feet of water per minute out of the river into the canal. This was done by the city for its own protection, to keep its sewage out of the lake, and it operated the pumps until it was relieved by turning the sewage into the drainage channel of the sanitary district. The pumps raised the water from the Chicago river into the canal, whence it flowed very slowly toward Lockport. When the sanitary district channel was opened the city had no further interest in pumping water into the canal.

In 1892 the sanitary district commenced cutting its channel, which it claimed to be completed in the latter part of 1899. The canal and drainage channel are practically parallel from Chicago to Lockport. Both connect with the Chicago river and draw their supply of water from Lake Michigan through the river. The inlet to the sanitary channel is at Robey street, and the inlet to the canal is about 2500 feet east, toward the lake. The supply for the sanitary channel is therefore drawn past the inlet to the canal. While the canal and drainage channel are parallel, they are in no way connected with each other. The act for the formation of sanitary districts provides for a commission to be appointed by the Governor to ascertain whether a channel is of the character and capacity required by the act, and upon their report that such is the case the Governor is directed to authorize the water and sewage to be let into the channel. The commission to examine the drainage channel was appointed in May, 1899, and on January 2, 1900, they reported the channel, in substance, complete. The Chicago river is a navigable body of water under the charge and control of the Federal government, which granted permission to the sanitary district to connect its channel

with said river. The canal commissioners discovered that the admission of water into the drainage channel would lower the level of the water in the Chicago river at the inlet to the canal from two to two and a half feet, and, of course, they knew that the city of Chicago would stop pumping water into the canal. At the instance of the canal commissioners the Attorney General filed an information in the nature of a bill in equity in the circuit court of Will county to restrain the sanitary district from lowering the level of the water in the Chicago river. On the petition of the sanitary district this information was removed into the circuit court of the United States, on the ground that a Federal question was involved, and that information is still pending. The city of St. Louis was also threatening to enjoin the sanitary district from opening its channel, and the Governor of this State refused permission to open it unless it would preserve navigation on the canal. The sanitary district was very desirous of opening the channel to turn in the water before there should be any interference on the part of the city of St. Louis, and on December 21, 1899, it entered into the written contract with the canal commissioners which is the foundation of this suit. By that contract the sanitary district agreed that for the period of four months after opening its main channel it would supply the summit level of the canal with a volume of water equal to the average volume which had been supplied to said canal by the pumps at Bridgeport for the year 1899,—not less than 35,000 cubic feet per minute; that it would lower the lock at the junction of the canal with the Chicago river prior to April 1, 1900, so as to maintain a depth of six and one-half feet of water over the mitre-sills of said lock, and that after the expiration of four months it would maintain throughout the summit level of the canal a navigable depth of six feet of water. The volume of water to be supplied for the purpose of maintaining this navigable depth of six feet was to be determined by the

needs of navigation. The obligation was perpetual, and the sanitary district was to have the right to enter upon the canal in order to make such excavations in the summit level as might be necessary to secure said six feet of water, if it should find that method more economical than to pump that amount of water into the canal. After the execution of the contract and the report of the commission the water was turned into the drainage channel and the sanitary district entered upon a performance of the contract. It re-built the lock at the entrance to the canal and paid the city of Chicago for operating the pumps at Bridgeport until July 16, 1900, when it took charge of them. It maintained a navigable depth of six feet of water throughout the entire length of the summit level of the canal. To maintain said depth of six feet it is necessary to raise the water two and two-tenths feet above datum before mentioned, which is a point generally established and used for the purpose of municipal and other levels and surveys in and around Chicago.

On November 1, 1900, the sanitary district notified the canal commissioners that on and after November 15, 1900, it would cease to pump water into the canal, as provided by the contract, and that it claimed the contract was null and void and of no legal effect. The canal commissioners then filed their bill in the circuit court of Cook county in this case on November 9, 1900, to enforce the specific performance of said contract, and praying for an injunction against the sanitary district from ceasing to supply the summit level with an amount of water sufficient to maintain a navigable depth of six feet, and from violating the terms of said contract. The sanitary district answered the bill, and upon a hearing the court decreed that said district specifically perform the contract from April 1 to November 15 in each year, and that during said portion of each year it should be enjoined from refusing or failing to comply with the contract, and that it should pay the costs of the suit. The decree was un-

satisfactory to both parties,—to the sanitary district because it ordered a specific performance of the contract, and to the canal commissioners because it limited the time during which water should be supplied from April 1 to November 15 in each year, and did not require the water to be supplied whenever it was needed according to their judgment. Each of the parties, therefore, prayed an appeal. The canal commissioners perfected their appeal to this court and are the appellants here, while the sanitary district appealed to the Appellate Court for the First District and is the appellee here. The question which of the appeals was properly taken is raised by motion of appellee to dismiss the appeal to this court, and that motion must first be disposed of.

Section 88 of the Practice act provides that appeals from circuit courts in all cases in which the State is interested, as a party or otherwise, shall be taken directly to this court, and the appeal of the canal commissioners was taken under that provision. The sanitary district insists, in the first place, that said provision was repealed, by implication, by the amendment in 1887 of section 8 of the Appellate Court act. The question so raised was decided to the contrary in *Dement v. Rokker*, 126 Ill. 174, where it was held that our jurisdiction given by section 88 of the Practice act was not taken away by said amendment, since the amendatory act was limited, both by its title and subject matter, to Appellate Courts. It was said that if the amendatory act presumed to affect our jurisdiction it would be unconstitutional and void because such an object was not expressed in its title. The cases cited by counsel in support of the motion do not in any manner conflict with that decision.

The sanitary district also contends that the suit is not one in which the State is interested, within the meaning of said section 88, and that the State has no more interest in this suit than in a suit between two counties or two public agencies, or a suit involving any other matter

of a public nature. The State, as such, is not interested in suits of the character mentioned, but in this case the litigation concerns the property and interests of the State. The interest here is not such a remote one as the State may be said to have in a suit of an individual with a tax collector or where there is an attempt to collect a fine or a penalty, but it is a direct interest in the litigation. The canal commissioners act in their official capacity for the State, which is the owner of the canal. The total cost of the canal to the State has been in the neighborhood of \$10,000,000, and the cost of the deep cut, for which the city of Chicago was reimbursed, was about \$3,000,000. It extends through a number of counties, where it is a local benefit, but it is maintained by the State at great expense. It has not been self-supporting for many years, and nearly every legislature has appropriated large sums of money to supplement its constantly dwindling revenues. A statement of the gross tolls taken on the canal shows that they have decreased from \$300,000 in 1865 to an average of less than \$40,000 during the last five years. The State makes up all deficiencies, and maintains a board of canal commissioners, with their equipment, officials and employees, to operate the canal as a State enterprise. The suit being one in which the State is directly interested, the motion to dismiss the appeal is overruled.

As the cross-errors question the action of the circuit court in granting any relief by way of specific performance, they are naturally the first to be disposed of. The principal grounds of objection by the sanitary district to the decree are, that the contract is *ultra vires*; that to perpetually supply the canal with water, or to maintain it, is not within the powers conferred by its organic act, and therefore its officials had no power to enter into the agreement to furnish such supply; that the contract itself is of such a nature that a court of equity should not enforce it by a decree for specific performance, and that

it is oppressive, and was made under such circumstances of coercion that it should not be enforced.

By the act under which the sanitary district is organized it is empowered to construct and maintain a channel for carrying off and disposing of drainage, including sewage of the district; to make and establish docks adjacent to any navigable channel created under the act, and to lease, manage and control such docks, and control and dispose of any water power incidentally created. It is authorized to raise funds for its corporate purposes by taxation of the district. The canal commissioners do not contend that funds to maintain and operate the canal can be raised by taxes levied on the sanitary district, nor that the sanitary district can operate the canal, or assist materially in the maintenance and operation of it, as a primary enterprise of the sanitary district. Nor is it contended that a corporation of the character of the sanitary district is ever estopped to deny its authority to enter into a contract, but it is insisted that by its charter it was authorized to make the contract in question. The sanitary district may sue and be sued, contract and be contracted with, and make any contract necessary or proper to carry into effect the purpose of the corporation. It may take or damage private property for its corporate purposes, and may acquire, by condemnation, purchase or otherwise, any right of way or property needed for such purposes. It is claimed that it has no authority to lower the level of the Chicago river below what it had been, which was practically the same as the level of Lake Michigan, and if it does so and injures the canal it must pay the damages, and therefore it may contract to pay money to avert such an injury or promise to pump water for the same purpose.

The argument that the sanitary district cannot lower the level of the river or the summit level of the canal, but must restore the canal to its former condition, is based, in the first instance, upon the seventeenth section

of the act to create sanitary districts. (Hurd's Stat. 1899, p. 331.) That section is as follows: "When it shall be necessary in making any improvements which any district is authorized by this act to make, to enter upon any public property or property held for public use, such district shall have the power so to do and may acquire the necessary right of way over such property held for public use in the same manner as is above provided for acquiring private property, and may enter upon, use, widen, deepen and improve any navigable or other waters, waterways, canal or lake: *Provided*, the public use thereof shall not be unnecessarily interrupted or interfered with, and that the same shall be restored to its former usefulness as soon as practicable: *Provided, however*, that no such district shall occupy any portion of the Illinois and Michigan canal outside of the limits of the county in which such district is situated for the site of any such improvement, except to cross the same, and then only in such a way as not to impair the usefulness of said canal, or to the injury of the right of the State therein, and only under the direction and supervision of the canal commissioners: *And, provided further*, that no district shall be required to make any compensation for the use of so much of said canal as lies within the limits of the county in which said district is situated except for transportation purposes."

The section so relied upon does not require the sanitary district to maintain the former depth of water in the canal, since the conditions do not bring it within the terms of the section, which relates to a physical entry upon property and authorizes such entry upon certain conditions. There is no connection between the drainage channel and the canal. They each connect with the Chicago river at points about half a mile apart. The complaint is, not that the sanitary district has entered upon property of the canal or used it in any way, but that by permission of the Federal government the sanitary

district is drawing so much water from Lake Michigan through the Chicago river that the surface of the river has been lowered from two to two and a half feet at the point where the water is taken from the river into the canal and the gravity flow is thereby reduced. There has been no entry upon the canal, and its navigation has not been affected by any entry upon it so as to require it to be restored to its former usefulness.

The canal commissioners also contend that, aside from the provisions of said section 17, the sanitary district would be liable for such damages as it might cause to the canal by lowering the water in the Chicago river, and therefore it might contract to prevent such injury by pumping water into the canal. As before stated, the Chicago river is subject to the regulation of Congress and under the exclusive control of the Federal government, (*City of Chicago v. Law*, 144 Ill. 569,) and the sanitary district connected its channel with said river by permission of said government. Before such connection was made the Chicago river was practically level from Lake Michigan to the mouth of the canal, and after the connection was made and the drainage channel drew the current from Lake Michigan past the mouth of the canal, it lowered the river from two to two and a half feet. This would be an injury to the canal to that extent, and if we should assume that the sanitary district would be liable for such injury, and that its officials might properly enter into a contract ascertaining the amount of damages and adopting means to avert the injury for which it must respond in damages, the question arises whether this contract is of such a nature that a court of equity would decree a specific performance of it.

A court of equity decrees the specific performance of a contract when by that means it can accomplish more perfect and complete justice than can be attained by an action at law. But the right to a specific performance is not absolute, like the right to recover damages in the

action at law. Whether the court will compel a party to do the particular thing he has agreed to do is a matter of sound judicial discretion, depending upon the circumstances of the particular case. Although a contract may be legal and enforceable, it must be perfectly fair, equal and just, and such as a court of equity will commend, or it will not be specifically enforced. In this case, the evidence shows that the officials of the sanitary district, to meet the demands of the Governor and canal commissioners, went far beyond any purpose or object of preventing the injury that would be done to the canal by lowering the water in the Chicago river. If the drainage channel had never been constructed or the level of the Chicago river in any manner affected there would not be a navigable depth of six feet of water in the canal. With the exception of the period after 1871, when the canal was deepened and there was a gravity flow of water from the Chicago river sufficient for navigation, there has never been a time when there was a depth of six feet from such gravity flow. In 1871 the waters of Lake Michigan stood at an average of twenty inches above datum—the low-water mark of 1847. A chart published by the Engineering Society of the city of Chicago, in evidence, shows that fact, and that the water in that year was as high as thirty-four inches above datum. The average height was above datum up to and including the year 1890. There is also in evidence a report of the deep water way commission to the Secretary of War, showing that the level of Lake Michigan has been permanently lowered at least a foot since about 1890 by the deepening of the channels of the Detroit and St. Clair rivers. Since 1890 the average height has been about at datum, and in 1892, 1893, 1895 and 1896 the average was below that mark. The average height of the water would not support navigation in the canal if the river were on a level with Lake Michigan, and the water in the lake is frequently so far below datum that a gravity flow from

the river on a level with it would leave very little water in the canal. Since 1888 there has never been a time that there was a navigable depth of six feet of water without the aid of the pumps, which constantly threw large quantities into it. The sanitary district is under no obligation to continue the pumping which the city of Chicago did for the purpose of keeping the sewage out of the lake. It also appears that the cost of operating the pumps that were supplying the canal with water according to the contract would be at least equal to the tolls taken on the canal.

If the contract is regarded as a legal one and enforceable at law, its terms are such that a court of equity should refuse to enforce it specifically. To do so would require the taxation of the sanitary district to maintain the canal at a height that would not exist if the district had never interfered with the Chicago river. It would require the sanitary district to confer a benefit upon the canal in addition to compensating for any injury to it. While the level of the water in the lake had averaged about at datum for years before the drainage channel was opened, the decree requires the sanitary district to raise the canal two and two-tenths feet above datum.

Generally, too, a specific performance of a contract will not be decreed where it calls for a continuing series of acts. (Pomeroy on Specific Performance of Contracts, sec. 312.) The defendant must have the capacity and ability to perform the contract, and the court must be able to enter an efficient decree for its performance. It is undoubtedly true that where an action at law would not afford adequate relief, equity will require the performance of continuous acts. In such a case the court might run a railroad, or compel the operation of pumping works, the purchase of new pumps, the collection of taxes to pay the expenses, and other things of that kind. The courts have enforced a specific performance of contracts by one railroad company to give another a right

to run trains over its road where continuous running arrangements were required, and requiring a railroad company to operate a railroad as lessee, and similar agreements, but only because justice could not otherwise be done. The jurisdiction to decree a specific performance of contracts is founded upon the inadequacy or impracticability of the legal remedy. While there are numerous conditions under which a party will not be permitted to elect to pay damages rather than to perform his contract, yet specific performance will only be decreed where the legal remedy or compensatory damages fail to do complete justice between the litigant parties. (Pomeroy on Specific Performance of Contracts, secs. 9-27.) In a case which calls for the intervention of equity, the court will compel a party to do the thing he has agreed to do rather than to pay damages for a breach of his contract; but in this case we do not think that equity should interfere, and that if there is a remedy it should be sought in a court of law, in an action for damages. If the contract is enforceable at law the canal commissioners can recover compensatory damages for the breach of it. If the measure of damages is the cost of pumping, they can hire it done and the cost will be easily ascertained. If the contract cannot be enforced in its entirety but the sanitary district is liable under it, or otherwise, for the injury done to the canal, the damages are as readily ascertainable as in any other case of injury to property.

The question of liability to the extent of the alleged damage to the canal is not before us on this record and is not decided.

Having concluded that the contract is not one which equity will specifically enforce, the decree must be reversed.

The decree of the circuit court is reversed and the cause is remanded to that court, with directions to dismiss the bill.

Reversed and remanded.

THE IROQUOIS FURNACE COMPANY

v.

JAMES MCCREA.

191 840
208 * 42

Opinion filed June 19, 1901—Rehearing denied October 9, 1901.

1. EVIDENCE—*when photograph is properly denied admission.* In a personal injury case a photograph is properly denied admission where it is not shown to be a correct representation of the place of injury as it was prior to or at the time of the injury.

2. SAME—*when evidence of insufficient light for work is proper.* In an action for injuries received by a servant in falling from a dump pile on a dark night, evidence that all the torches and lights furnished by the master were in use is properly admitted as bearing upon due care by the plaintiff, even though such evidence could not be considered on the question of defendant's negligence, owing to there being no allegations of negligence in that regard.

3. TRIAL—*what a proper examination of jurors upon their voir dire.* If an attorney for a certain casualty company is present with the attorneys for the defendant in a personal injury case it is proper to permit plaintiff's counsel, for the purpose of enabling them to exercise their right to peremptory challenge at least, to question certain jurors upon their *voir dire*, as to their interest in such casualty company.

WILKIN, C. J., and CARTWRIGHT, J., dissenting.

Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

The following statement of facts in this case is made by the Appellate Court:

"This is an action to recover damages for personal injuries sustained by appellee, as is charged, through negligence of appellant. Appellee was employed as night foreman of appellant, a corporation engaged in conducting an iron foundry. The work of appellee consisted in part in superintending the removal of cinders and refuse from the furnaces to a dump-pile. The evidence tends

to show that this dump-pile was from time to time reduced by removal of wagon loads of the cinders and refuse from it during the daytime. Such removals left the pile with a sloping surface, sloping from its top usually at an angle of about sixty degrees. Just prior to the injury in question there had been an unusual amount of the contents of the pile removed during the daytime, which resulted in leaving the pile with a sharp edge, presenting a perpendicular wall of about nine feet, instead of a sloping bank. This change was made by daytime, and there is evidence tending to show that it was effected within a day or two prior to the injury. There is no evidence that appellee was informed, when he came on for his night work, of these changes which had been made in the daytime. Appellee testified that he was unaware of the change. Upon the night of the injury it became the duty of appellee to direct one Flynn, an extra man employed by the appellant, to work wheeling cinders from the furnaces to the dump. Flynn came to appellee and stated that it was too dark to work without a light. Appellee started to go with Flynn to see if it was practicable to work about the dump without a light. The appellant company furnished torches to its employees, but at this time all the torches were in use, and there was none which appellee could take for his own use, or to furnish to Flynn, without depriving some other workman of his light. Appellee and Flynn went without a torch or other light toward the dump-pile, and, as they proceeded in the dark, appellee fell over the edge of a sharp declivity, and was injured. The injury consisted of a broken leg, which united, leaving the ankle enlarged and stiffened. The evidence tended to show a permanent lameness."

The trial in the circuit court resulted in verdict and judgment in favor of appellee for \$5000.00. From this judgment an appeal was taken to the Appellate Court,

and the Appellate Court has affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance.

WALL & ROSS, (PERCY WERNER, of counsel,) for appellant.

KING & GROSS, (ANDREW J. HIRSCHL, of counsel,) for appellee.

Per CURIAM: The questions whether the appellant was guilty of negligence which produced the injury, and whether the appellee was guilty of contributory negligence, and whether or not the damages assessed were excessive, are all questions of fact. These, and all the other questions of fact in the case, are settled by the judgments of the lower courts.

In disposing of the other questions involved, the Appellate Court, in its decision, expressed the following views:

"We are of opinion that the action of appellee cannot be said to constitute negligence *per se*. * * *

"The evidence as to demanding more torches from the assistant superintendent was not objected to, and evidence of the fact, that there was no light and no torch not in use when appellee went out with Flynn, was competent, not to establish negligence of appellant in failing to furnish one, for such negligence was not pleaded, but as bearing upon the reasonable care of appellee.

"The court did not err in excluding the photograph offered in evidence, for it did not appear that it was a correct representation of the dump-pile, as it was at or prior to the time of the injury. If it were desired to present a photograph of the boilers only, one should have been prepared, which was not likely to mislead, by showing also the dump-pile as it was a year after the time in question.

"The following instruction was presented to the court by counsel for appellant:

"The court instructs you that, if you believe from the evidence, that the plaintiff knew of the removal of the dirt and debris from the dump-pile, or by the exercise of ordinary care could have known of the removal of dirt and debris from the dump-pile, and if the jury also believe from the evidence that the plaintiff failed to exercise ordinary care in going out to the place where he was injured in the night time, then your verdict must be for the defendant.'

"The court modified this instruction by inserting the words, 'at or near the place where plaintiff fell' after the words 'dump-pile.' This modification is complained of as error. The instruction taken altogether stated a correct proposition as tendered, and it was equally correct as modified. We are of opinion that the modification did not impose upon it any limitations which were prejudicial to appellant. Without its last hypothesis the instruction would in either case, as tendered or as modified, be bad. It would not follow, because appellee knew of some removals from the pile which always left it with a gradually sloping bank, that, therefore, he was to be charged with notice of a new departure, by which the slope was changed into a sheer descent of nine feet. The words 'at or near the place where plaintiff fell' would, in their natural and reasonable application, cover any evidence which was introduced showing any knowledge of appellee of prior removals.

"The following instruction also was tendered by counsel for appellant:

"The court instructs you, that there are no allegations in the declaration that the defendant was guilty of negligence in failing to furnish the plaintiff lights at the time and place where he was injured, and, therefore, you will disregard all testimony pertaining to the question of lights, and, unless you find the defendant is guilty of

negligence as charged in the declaration, your verdict must be for the defendant.'

"The court modified this instruction so that it read as follows:

"The court instructs you there are no allegations in the declaration that the defendant was guilty of negligence in failing to furnish the plaintiff lights at the time and place he was injured; and therefore, you should not find the defendant guilty of negligence in regard to the furnishing of light or base your verdict upon any claimed want of light or torches, and unless you find the defendant is guilty of negligence as charged in the declaration, your verdict must be for the defendant.'

"This modification is assigned as error. We are of opinion that the instruction as tendered was bad, and that the modification by the court made it a proper instruction. The evidence referred to was competent to be considered upon the question of the care exercised by appellee. It was not competent as showing negligence of appellant, for such negligence was not alleged, and to that extent the instruction as modified properly excluded it.

"It is complained that the court erred in permitting counsel for appellee to question certain jurors upon their *voir dire* as to their interest in the Union Casualty Company. It appears that an attorney, representing that company, was present with the attorneys for appellant at the trial. The question was proper at least for the purpose of enabling counsel to exercise their right of peremptory challenge, if for no other purpose. (*O'Hare v. Chicago, Madison and Northern Railroad Co.* 139 Ill. 151; *American Bridge Works v. Pereira*, 79 Ill. App. 90, and cases therein cited.) * * * The judgment is affirmed."

We concur in the views above expressed by the Appellate Court, and in the conclusion reached by them.

Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILKIN, C. J., and CARTWRIGHT, J., dissenting:

At the close of the evidence for the plaintiff, and again at the close of all the evidence, the defendant presented to the court an instruction that the evidence was insufficient to sustain the allegations of the declaration and that the verdict should be for the defendant, with a request to give it to the jury. The request was refused and the refusal is assigned as error. The question raised by that assignment is not one of fact, and has not been settled by the judgment of the Appellate Court, as we have held in numerous cases. The motion to instruct the jury to find for the defendant raised a question of law, reviewable in this court, whether there was evidence before the jury which, with all the inferences to be fairly drawn from it, would support a verdict for the plaintiff. (*Offutt v. World's Columbian Exposition*, 175 Ill. 472, and cases cited.) The essential facts to be proved by plaintiff were the exercise of ordinary care on his own part, the failure to use a like degree of care by the defendant, and an injury, of which such failure was the proximate cause. In acting on the request for the instruction the court was called upon to consider whether there was evidence which, with all the inferences that might justifiably be drawn from it, fairly tended to prove that the plaintiff was in the exercise of reasonable care for his own safety and that defendant was guilty of negligence as charged in the declaration. The declaration contained one count, in which plaintiff alleged that defendant was operating a factory and plaintiff was in its employ as night furnace-man; that in the ordinary course of his duty he had frequent occasion to pass over a bed of cinders; that it was the duty of defendant not to excavate or remove any material part of the cinders without giving him due warning of the same, in order that he might not fall, while walking in the dark on said bed of cinders, into any excavation; that the defendant carelessly excavated and took away a large portion of said bed of cinders in

the daytime without giving him any warning or notice, and that while he, with all due care and diligence, was walking on said bed of cinders in the night time, in the ordinary course of his duty, he fell from said bed of cinders into the excavation and broke his leg. There was no allegation of negligence in removing the cinders, but the duty alleged was to not make the removal without notice, and the breach of duty charged was in making such removal without warning to plaintiff.

For the purpose of deciding whether there was evidence which fairly tended to sustain the alleged cause of action, a more complete statement of the evidence than the foregoing, adopted from the Appellate Court, seems to be necessary.

There was very little, if any, disagreement at the trial as to the facts of the case. The evidence which it is claimed fairly tended to prove the duty alleged, and a breach thereof, and the care of the plaintiff, is as follows: On November 12, 1895, plaintiff was night foreman for the defendant at its works in Chicago, where it was engaged in the business of making pig iron. He had worked for the defendant five years, and began when the furnace was being constructed. His work was in the day time until August, 1895. In 1894 he was put in charge of all the outside labor in the daytime, and continued in charge until he was made night foreman, in August, 1895. After that time he had charge of the men working at night, and in the absence of the superintendent, assistant superintendent or manager he had absolute authority at the works. The night gang consisted of about forty-six men, of whom he had full control. Everybody was bound to obey his orders and he had full power to discharge any of the men. He commenced going on duty in August at a little before six in the evening and had charge until six in the morning. There was a boiler house standing east and west, with fourteen boilers fronting toward the north. In front of the boilers there was

a paved passageway about eight feet wide, with a row of iron posts at the outer edge. Outside of these there was a passageway about twenty feet wide and another row of posts. Beyond these there was a dump-pile, composed of cinders and other refuse of the works. This refuse was wheeled out as it was made, and dumped and leveled off so as to make an embankment about nine feet high, from the natural surface of the ground to a level with the floor of the boiler house. Men wheeled the cinders and refuse from what was called the "down-comer" to the edge of the embankment, and dumped the wheelbarrows at the edge so that the cinders ran down the declivity as steep as they would stand,—perhaps at an angle of sixty degrees. Slabs were used in the doors of cars to keep the coke from falling out, and were called "coke sticks." There was a pile of these coke sticks put outside of the outer row of posts on the dump, to be used as fuel in the furnaces when gas was short. According to plaintiff's witness Joseph Boyer the embankment was fifty to seventy-five feet long. He testified that teams were hauling the dirt away quite often; that defendant kept a boy there to keep tally, and the superintendent told the witness to keep an eye on how many loads were hauled away. Plaintiff testified that he had never known but one load of this stuff to be hauled away, but there is no dispute that it was the custom to dispose of the refuse, as defendant had opportunity, to contractors and others for filling. Plaintiff had been there for years while this was done, and could see what the custom was as to disposing of the stuff and hauling it away. During the year 1895, before the accident, defendant had sold a large quantity of the cinders to a contracting company, that was hauling it away. On the day before the accident there was a considerable quantity hauled, leaving the embankment perpendicular, and the pile of slabs or coke sticks was taken away so as not to interfere with further removal of cinders. The edge of the bank was

nearer to the boilers than it had been. On the evening of the accident plaintiff came to work, and he had an extra man there by the name of James Flynn. He told Flynn there would be nothing for him to do and to come up and wheel the stuff from the down-comer. Plaintiff went to the office and Flynn came to the door and said he wanted a light; that he could not see anything, and was afraid to go out there without a torch. Plaintiff asked him if he couldn't do without a light, and he said he could not, and plaintiff proposed to go and see. He told Flynn to come along and he would show him where to dump the stuff. They went out, plaintiff leading the way. It was so dark they could not see anything, and the plaintiff stooped over and held his hands out, feeling for the coke sticks. He went thirty-five or forty feet from the boilers before he came to the edge of the bank. He was going entirely by the sense of feeling and could not see that the coke sticks were gone, and when he came to the edge of the embankment he fell over and broke his leg. He had gone out occasionally before that time at night to show the men where to dump cinders, and the last time was two nights before the accident. He testified that there were about twenty torches in use there, and he had authority to take one of the torches if he chose, by stopping the work of a man while he used it; that he was accustomed to take a torch when he went out to take the numbers on the iron cars near the furnace, but that he always went out without a torch on the dump-pile and could feel around, and that he could take a torch wherever he found it.

The failure to furnish light was not charged as a breach of duty towards the plaintiff, and there were torches which he had a right to use. Nor was it charged as negligence that the cinders had been removed as the defendant was in the habit of doing, and as it naturally would whenever it had an opportunity of selling them. One question is whether, in the exercise of ordinary care,

the defendant was bound to give notice to the plaintiff that a lot of cinders had been removed that day. The plaintiff does not come within that class of cases where a person must be informed of a condition because of his youth or inexperience. He was a man of maturity and experience, whom the defendant had placed in charge of its business, and it was not bound to point out dangers which were likely to be appreciated and understood by a person of his capacity. On this motion it must be assumed that the plaintiff had not, in fact, noticed the changing condition of the dump-pile. That fact, however, cannot avail him for two reasons: In the first place, the defendant had a right to act on the presumption that he knew of the customs and conditions that had been under his observation for years. The question whether defendant was guilty of negligence in not notifying the plaintiff of the changing condition of the dump-pile is to be judged upon the assumption that plaintiff knew what was open to his observation. In the second place, plaintiff is chargeable, in law, with knowledge of conditions which he had full opportunity to know. The law does not furnish one standard for employer and another for employee. It would be unavailing to the defendant to say that it did not know of the changing condition of the dump-pile when by the exercise of reasonable care it would have known of it,—and the same thing is to be said of the plaintiff. Actual ignorance of a condition open to observation would neither be allowed as a ground of defense to the defendant nor a ground of recovery to the plaintiff. To create a liability the defendant must have had reasonable ground to believe that the injury would result as a consequence of a failure to give notice. If, in the light of attending circumstances, such an injury might result as a natural and probable consequence to one using ordinary care, it would be negligence to not give warning. In determining whether plaintiff's fall might have been foreseen and expected by the defend-

ant it had a right to assume that he would act with reasonable care and caution in performing his duties. The standard on each side is not the behavior of the careless and reckless, nor of those who take counsel of their fears to guard against dangers which are barely possible, but of the reasonably prudent in view of the ordinary course of human affairs. The coke sticks were put there to be used as fuel, and were not intended as a warning or for a guide or protection. The defendant could not anticipate that their removal would operate to take away a warning of danger, and especially at a time when it was so dark they could not be seen at all. We do not see how it can be said that defendant should assume it as probable that the plaintiff would go out there where he could not see anything and could not have seen the pile of coke sticks if they had been there, to feel for the pile of coke sticks and show a laborer where to work. According to the testimony, if plaintiff had made his exploration in safety Flynn could not have seen the coke sticks or the edge of the bank after they had been found. If there had been no excavation, plaintiff would surely have gone down a declivity of sixty degrees. Whether he would have been injured as he was is a matter of mere speculation, although it was undoubtedly more dangerous on account of the bank being perpendicular.

Again, it was necessary that there should be evidence fairly tending to show that the plaintiff was in the exercise of reasonable care for his own safety. He testified that he had power to take a torch, and he claims that he has acquired a right to sue the defendant and recover damages for the injuries sustained because he did not take one. Defendant had invested him with absolute control of the premises, and whether the torches were many or few, he had an absolute right to secure his own safety by using one. He was vice-principal and foreman, and instead of exercising his powers and right he went out in utter darkness, where he could only feel his way and

where Flynn was afraid to go. If Flynn had been injured defendant would undoubtedly have been held liable on the ground of negligence of plaintiff, as its foreman, in taking him out there. As it happened, plaintiff was the one who was hurt as a result of the same act of negligence on his part.

We think the instruction should have been given.

A. BOOTH & Co.

v.

SAMUEL B. RAYMOND, County Treasurer, *et al.*

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

TAXES—*when collection of tax will not be enjoined.* The collection of a personal tax against a corporation will not be enjoined because of a clerical error in entering the corporate name, where the tax is authorized by law and the complainant is the owner of the property taxed and is the corporation intended to be taxed, and where, in the proceedings before the board of review, the complainant treated the name as its corporate name, assuming itself to be the corporation intended to be taxed.

WRIT OF ERROR to the Circuit Court of Cook county;
the Hon. E. F. DUNNE, Judge, presiding.

THORNTON & CHANCELLOR, for plaintiff in error.

JULIUS A. JOHNSON, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for defendants in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery exhibited by the plaintiff in error company to enjoin the threatened levy upon and sale of the personal property of the company by virtue of the warrant attached to the collector's book issued for the collection of taxes for the year 1899 in the town

of South Chicago, in the county of Cook. A temporary injunction was granted, but upon a final hearing a decree was entered dissolving such temporary injunction and dismissing the bill. This is a writ of error to secure reversal of the decree.

The warrant authorized the collector to collect from the several persons named in the said collector's book the several sums of taxes therein charged opposite their respective names. The plaintiff in error company is a corporation organized under the laws of this State. The corporate name of the plaintiff in error company, viz., "A. Booth & Co.," did not appear in the collector's book. On said book there was, however, charged the sum of \$2536 of taxes against "A. Booth Packing Company." It was this sum of taxes which the collector demanded the plaintiff in error company should pay, and which he proposed to collect by seizing on and selling the personal property of the plaintiff in error company.

The bill alleged the board of review had arbitrarily and without the consent of the plaintiff in error company increased the assessable value of its property from \$74,514, as given by it in the schedule of its property prepared by it and returned to the assessor, to the sum of \$200,000, and that the valuation so fixed by the board is far in excess of the value of its assessable property, and that the action of said board of review in increasing such valuation was unwarranted and oppressive. The only ground for reversal, however, urged in the brief filed on behalf of the plaintiff in error company is, that the collector had no warrant against the plaintiff in error company, but was proceeding to levy a warrant against another separate and different corporation upon the property of the plaintiff in error company, and to sell such property to satisfy taxes assessed and extended on the collector's book against such other corporation, and that it was error to dissolve the preliminary injunction restraining such seizure and sale of its property and to

dismiss its bill praying that such seizure and sale should be perpetually enjoined.

It appeared the plaintiff in error company, on the first day of April, 1899, was engaged in the business of buying and selling fish and oysters in the city of Chicago. It was the successor of said A. Booth Packing Company in that business and transacted its business in the same building that its predecessor occupied when in the same trade. The bill filed by the plaintiff in error company alleged that it prepared and delivered to the assessor a schedule of its property subject to assessment for taxation on the first day of April, 1899, showing the full cash value thereof to be the sum of \$74,514, and that the taxes, if extended on the sum, would amount to \$944.66, but, to quote from the bill, "that some years ago there was in the city of Chicago, transacting business of the same character with that which your orator now does, a corporation by the name of the A. Booth Packing Company, but that said corporation has long since ceased to do business and has done no business within the limits of Cook county since March, 1899, and for some time prior thereto; that by some mistake on the part of said board of assessors and board of review your orator has been assessed, not in its corporate name, but as A. Booth Packing Company; * * * that after the said assessment had been made by the board of assessors, the board of review of said Cook county arbitrarily and without the consent of your orator claimed, and as the result of its action set down, as the fair cash market value of the personal property of your orator the sum of \$200,000 and assessed the same at \$40,000, though no complaint was ever filed with the board of review claiming that the assessment made by the board of assessors was inadequate; that no showing was ever made and no evidence ever produced before the board of review proving or tending to prove that your orator had not made a fair and full schedule of all of its personal property subject to assess-

ment in Cook county." The bill further alleged that the plaintiff in error company, within the time allowed by law, protested to the board of review against such increased valuation of its assessable property, and under such protest such proceedings were had as that the plaintiff in error company was led to believe the assessable value of such property would be fixed at \$150,000, and that the plaintiff in error company filed another protest to obtain a further reduction of such valuation of the property for taxation. The bill also alleged that by reason of the mistake in assessing its property not in its corporate name but in the name of the A. Booth Packing Company, (to quote from the bill,) "no warrant has been or can be issued against your orator, yet it is not desirous of taking advantage of said mistake, but offers to pay upon said warrant, which it assumes was intended to be against this corporation, the said tax of \$944.66, which it hereby tenders. Your orator says that it is willing that the books of the board of assessors, the board of review and those of the county clerk, together with the warrant in the hands of said Benjamin Barnett, South Town collector, who is hereby made party defendant to this bill of complaint, should be corrected so that the assessment of \$14,900 and tax of \$944.66 should appear to have been levied and assessed against your orator."

The bill was framed upon the assumption that the taxes sought to be collected were levied on the property of the plaintiff in error company and that the discrepancy in its corporate name was but an unimportant mistake. The plaintiff in error company, in its several protests before the board of review, did not question that the assessment of its property appeared correctly on the assessment roll in the name of the A. Booth Packing Company. It asserted the right before that board to challenge the correctness of the valuation of the property so assessed to the A. Booth Packing Company. It practically accepted that as the correct, or at least a

sufficient, designation of its corporate name. The testimony produced before the chancellor was addressed to the contention of the plaintiff in error company that its property was fairly valued in the schedule which it prepared and delivered to the assessor, and that the increase in the valuation thereof by the board of review was unwarranted and should not be approved by the court, but it is asserted in the briefs filed in behalf of the plaintiff in error that error intervened in the action of the chancellor or the evidence on that issue. The briefs in this court make no reference to the claim or issue that the property was assessed at too high a valuation, neither is it claimed that fraud of any character intervened. The taxes sought to be collected were assessed upon the property of the plaintiff in error company. The law authorized the levy and assessment thereof. The plaintiff in error company was the owner of the property upon which the tax was assessed and extended. It was the corporation intended to be taxed. Before the board of review it treated the name in which the tax was extended on the roll as its name. The addition of the word "Packing" to its corporate name did not affect the substantial justice of the tax, and furnished no reason, in equity, for relieving it of the duty of paying taxes justly and legally due and owing by it, and the chancellor properly declined to interfere with the efforts of the officers to enforce payment thereof. We have repeatedly declared a court of equity will not entertain a bill to restrain the collection of a tax except in cases where the tax is unauthorized by law or has been assessed upon property not subject to taxation, or where the property has been fraudulently assessed at too high a valuation. *Lyle v. Jacques*, 101 Ill. 644; *Keigwin v. Drainage Comrs.* 115 id. 347; *New York and Chicago Stock Exchange v. Gleason*, 121 id. 502.

The decree is affirmed.

Decree affirmed.

CHARLES F. MORSE *et al.*

v.

THE PACIFIC RAILWAY COMPANY *et al.**Opinion filed June 19, 1901—Rehearing denied October 10, 1901.*

191	856
f191	871
191	856
107a	81
e107a	82

1. ADMINISTRATION OF ESTATES—*section 70 of Administration act explained.* Section 70 of the Administration act, which provides that demands not exhibited within two years shall be barred unless assets not inventoried or accounted for shall be discovered, is not a bar to the revival, commencement or prosecution of a suit, but only a limitation upon the right to participate in assets which have been inventoried.

2. SAME—*the fact that suit is pending does not amount to exhibition of claim.* The facts that a suit is pending in the circuit court against a party at the time of his death, and that it might have been revived against the executors within two years from the granting of letters so that the decree would bind inventoried assets, do not amount to an exhibition of the claim or demand against the estate.

3. SAME—*knowledge of executors that claim is pending does not take case out of the statute.* Knowledge on the part of executors that a suit was pending against their testator at the time of his death does not take the case out of the statute requiring claims or demands to be exhibited against the estate within two years.

4. SAME—*effect where claim is not of a character cognizable by the county court.* Compliance with the statute requiring claims to be filed against an estate within two years is not excused because the claim is of such a character that it could not have been filed in the county court, since that fact would not prevent a suit in some other proper court, a judgment in which would bind the assets of the estate the same as a judgment of the county court.

5. SAME—*when claim is not contingent.* A claim cannot be regarded as contingent, so as to excuse the failure to file the same against the estate within two years, where all the facts out of which the liability arose existed before the testator's death, and where suit was being prosecuted against him at that time and might have been revived and prosecuted against the executors when the letters were issued, with the same effect as the filing of the claim in the county court.

6. SAME—*when decree cannot be against inventoried assets.* Where a suit is being prosecuted in the circuit court against a party at the time of his death, but his death is not suggested nor his executors made parties nor any proceeding taken to enforce the claim against the estate until some six years after the defendant's death, when a bill of revivor is filed, the decree rendered in favor of the

complainant in the revivor proceeding can be satisfied only out of assets not inventoried or accounted for by the executors within two years from the granting of letters.

7. PARTNERSHIP—*when purchase of stock is not a partnership affair.* The purchase of railway stock, issued to purchasers in the name under which they were conducting a partnership in the grocery business, is not a partnership transaction, where the stock was bought as an investment, only, each party paying, individually, one-half of what was paid on the stock, with the understanding that each should own one-half of it.

Morse v. Pacific Railway Co. 93 Ill. App. 31, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

WALKER & PAYNE, for appellants:

The effect of a bill of revivor is to substitute for the interested party in the original proceedings the person to whom his interest is transmitted, and the latter is then equally bound by the proceedings. 2 Am. & Eng. Ency. of Law, 274; Story's Eq. Pl. secs. 376-380; *Douglas v. Sherman*, 2 Paige, 361; 2 Barbour's Ch. Pr. 57; Cooper's Eq. Pl. 71; *Devaynes v. Morris*, 1 M. & C. 213.

Equity had taken jurisdiction of the subject matter and parties to the action prior to the death of the defendant, and having taken cognizance of the controversy will hold jurisdiction until final determination. Pomeroy's Eq. Jur. sec. 179; *Bank v. Railroad Co.* 28 Vt. 470; *Ober v. Gallagher*, 93 U. S. 199; *Atwater v. Bank*, 152 Ill. 618.

This is a proceeding in equity under section 25 of the act entitled "An act concerning corporations," and under said section the probate court has no jurisdiction. *Eames v. Doris*, 102 Ill. 350; *Richardson v. Akin*, 87 id. 138; *Lowe v. Buchanan*, 94 id. 76; *Queenan v. Palmer*, 117 id. 619; *Young v. Farwell*, 139 id. 326; *Wincock v. Turpin*, 96 id. 135; *Pollard v. Bailey*, 87 U. S. 520; *Patterson v. Lang*, 106 id. 519; *Richmond v. Irons*, 121 id. 27; 2 Thompson on Corp. sec. 1991.

It follows that the claim of the complainant could not have been produced in the probate court, as provided in section 60 of the act in regard to the administration of estates, and the requirement of section 70 of said act that all demands not exhibited within two years from the granting of letters of administration shall be forever barred, etc., has no application to this proceeding, and cannot be pleaded by the representatives of the estate of Simon Reid as a bar to the action.

The statute above referred to applies only to cases where the liability is absolute, and not merely contingent. *Dunnigan v. Stevens*, 19 Ill. App. 313; *Dugger v. Oglesby*, 99 Ill. 405; *Suppiger v. Gruaz*, 137 id. 216; *Bank v. Trust Co.* 87 Fed. Rep. 113; *Hawkins v. Glenn*, 131 U. S. 319; *Payson v. Hadduck*, 8 Biss. 293; *Howell v. Moores*, 127 Ill. 67.

WILSON, MOORE & MCILVAINE, for appellees:

The court properly decreed the payment of the amount due from the estate of Simon Reid out of the assets of said estate not inventoried within two years from the issuing of letters testamentary. *Roberts v. Flatt*, 142 Ill. 485; *Snydacker v. Swan Land Co.* 154 id. 220; *Welch v. Wallace*, 3 Gilm. 497; *Paschall v. Hailman*, 4 id. 301; *Turney v. Gates*, 12 Ill. 141.

The 625 shares of stock of the Pacific Railway Company were not owned by Reid and Murdoch as partners, and each was therefore only liable upon his own shares of stock. *Parsons on Partnership*, (2d ed.) sec. 1, p. 6, and note on p. 46; 17 Am. & Eng. Ency. of Law, 859; *Goel v. Morse*, 126 Mass. 480; *Southworth v. People*, 183 Ill. 621; *Gottschalk v. Smith*, 156 id. 377; *Hurley v. Walton*, 63 id. 260.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On January 19, 1891, the appellant Charles F. Morse, in behalf of himself and all other creditors of the Pacific Railway Company, one of the appellees, filed his bill in

the circuit court of Cook county, under section 25 of the general act concerning corporations for pecuniary profit, against said Pacific Railway Company and its stockholders, alleging the recovery of a judgment against that corporation and return of execution "no property found," and seeking to enforce the statutory liability of said stockholders for any unpaid balance upon their stock. The bill alleged that Thomas Murdoch and Simon Reid were the owners of 625 shares of the capital stock, and they were among the defendants. Reid answered the bill September 1, 1891, and died February 13, 1892, leaving a last will and testament, in which the appellees Thomas Murdoch, Byron L. Smith and Ezra J. Warner were appointed executors and trustees. The executors qualified and letters testamentary were issued to them February 22, 1892. They filed their inventory of the estate on May 30, 1892, in the county court of Lake county, the residence of the testator. The death of Reid was not suggested on the record, and the executors were not made parties defendant nor brought into the suit in the circuit court in any way. The issues in that suit were referred to a master in chancery, who made a report May 28, 1895, that there was no liability of the stockholders upon any unpaid balance of their stock. The report was confirmed and the bill dismissed for want of equity. The Appellate Court reversed the decree June 29, 1896, and on February 14, 1898, we affirmed the judgment of the Appellate Court finding that the stock was not fully paid and holding the stockholders liable for the unpaid balance. (*Sprague v. National Bank of America*, 172 Ill. 149.) No claim has ever been filed in the county court of Lake county against the estate of Reid, and there was no proceeding against the estate or the executors, or any attempt to charge the estate for more than six years after the issuing of letters, until a bill of revivor was filed in the circuit court in this case on June 20, 1898. The bill of revivor made the executors defendants, and alleged

that the stock was owned by Reid and Murdoch in partnership, and sought to charge both with liability for the unpaid balance on all the stock. The executors answered the bill of revivor, and set up and relied upon section 70 of the Administration act and the failure to exhibit the claim in the county court of Lake county within two years after the issuing of letters testamentary as a defense against any decree payable otherwise than out of estate not inventoried or accounted for within said period of two years. On July 1, 1898, the circuit court, under our mandate, determined that \$68 per share was the amount remaining unpaid upon the stock of the Pacific Railway Company, and referred the question of the liability of the executors to a master in chancery. The master reported that Murdoch was liable for the unpaid portion of the capital stock held by Reid and Murdoch; that the executors were also liable for said unpaid portion, and that, as between Murdoch and the executors, each was liable for one-half of said unpaid balance. The court sustained exceptions to the report, and entered a decree against Murdoch for the amount remaining unpaid on one-half of said 625 shares and against the executors for the amount unpaid on the other half, to be paid out of the estate of Reid not inventoried or accounted for by said executors in said county court within two years after the granting of letters testamentary. The Branch Appellate Court for the First District affirmed the decree, and the case is here on further appeal.

The order reviving the suit against the executors placed the proceedings in the same state and condition that they were in at the time of the death of Simon Reid, and it is first contended that on account of that rule the decree should not have been special against the executors nor payable out of assets not inventoried or accounted for within the two years. The suit was properly revived and the liability established against the estate of Reid for the amount unpaid upon the shares of stock

owned by him, but there is no rule which would make the executors defendants in that suit during a period of more than six years after they received their letters before the bill of revivor was filed. The suit went on from the point it had reached at the death of Reid, but the question here is as to the effect of section 70 of the Administration act, and out of what assets the decree shall be satisfied. That section provides that all demands against the estate of any testator not exhibited to the court within two years from the granting of letters shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate. This case does not fall within any of the exceptions contained in the section, and its provisions control the rights of the parties. It requires that all demands shall be exhibited within two years after letters testamentary are issued, in order that they may share in the distribution of assets inventoried or accounted for within that time, and if this claim was not so exhibited it cannot share in such assets. The suit was pending in the circuit court against Reid at the time of his death, and if it had been revived against the executors within two years from the issuing of letters, the decree, when entered, would bind the assets inventoried or accounted for within the two years. The suit might have been so revived, but the fact that it was pending against Reid at his death does not amount to an exhibition of the claim or demand made against the estate. That can only be done by filing the claim in the county court having jurisdiction of the estate, or by bringing suit against the executors in some court of competent jurisdiction. The knowledge of the executors that there was a claim made by creditors of the Pacific Railway Company would not take the case out of the statute, which requires the claim to be exhibited in a court. It is the duty of the claimant to institute a proper proceeding upon his claim, and the

fact that the executors know that a claim is made which is not exhibited in court makes no difference. *Roberts v. Flatt*, 142 Ill. 485.

It is said that the claim is of such a character that it could not have been filed in the county court; but if that is so, it did not prevent suit in some other court having jurisdiction or the revival of the suit against Reid. Although the statute speaks only of county courts, it has been held that the intention was to provide a complete system for the administration and settlement of estates; that it is not to be presumed that judgments of the circuit court are to be submitted to the revision of the county court, and that such judgments sustain the same relation to assets of an estate as judgments in the county court. A judgment in either court becomes a charge against the estate. *Darling v. McDonald*, 101 Ill. 370; *Roberts v. Flatt*, *supra*.

It is also said that equity had taken jurisdiction of the subject matter and would retain its jurisdiction until final determination of the controversy, and, therefore, the claim need not be filed in the county court. That is true. The circuit court had a right to retain its jurisdiction; but that does not affect the question out of what assets the claim should be paid. It is immaterial in which court the proceeding is had if it is a court of competent jurisdiction, and the provision of the statute is not a bar to the revival of the suit or the commencement or prosecution of any suit, but is only a limitation upon the right to participate in assets which have been inventoried and which the law requires to be distributed to heirs or devisees.

It is asserted, however, that the claim against Reid's estate was contingent during the two years and could not be exhibited to the county court; that the estate only became chargeable when the liability became absolute, and that, therefore, the claim is not affected by the statute. As a matter of fact, the cause of action had arisen

and the suit was being prosecuted against Reid. All the facts out of which the liability arose existed when Reid died, and the suit might have been revived when letters were issued, and have been prosecuted against the executors in the circuit court with precisely the same effect as the filing of a claim in the county court.

In support of the claim that a demand which cannot be exhibited to the county court within two years is not affected by the statute, counsel place great reliance upon the decision in *Dugger v. Oglesby*, 99 Ill. 405. That suit was by a subsequent grantee against the heirs-at-law and administrator of Dugger for a breach of covenants contained in a deed executed by Dugger and wife. The cause of action did not accrue until more than two years after the granting of letters. The court said the limitation in question did not apply—and that was correct as to the suit against the heirs. It was in fact applied in that case as to the administrator. The effort of counsel to apply that decision to this case probably results from failure to notice the character of the judgment entered, which was precisely the same as the decree entered in this case. The court said (p. 412): "The judgment order finds how much personal property and real estate came to and descended to each one of the heirs, the amount of both being \$1338.02. Judgment is then given against all the heirs and the administrator for \$3315.62, to be satisfied out of the estate so descended to the heirs, with express provision that neither of the heirs be subjected to a greater liability than to the extent of \$1338.02, and that the judgment as to the administrator be *quando acciderint*." That form of judgment was against property which should afterwards come to the hands of defendants to be administered. (8 Ency. of Pl. & Pr. 691.) In *Darling v. McDonald*, *supra*, the court said (p. 374): "Where the defense is successfully interposed that suit was not commenced or the claim was not exhibited within two years after the grant of letters of administration, the

judgment must be special, and payable out of assets to be thereafter inventoried, corresponding to the common law judgment of *quando acciderint*." In such a case and under such a judgment the creditor is entitled to participate in assets discovered or inventoried after the lapse of two years from the granting of letters. *Peacock v. Haven*, 22 Ill. 23; *Stone v. Clark's Admrs.* 40 id. 411; *Shepard v. National Bank*, 67 id. 292.

Decisions cited by counsel bearing upon the liability of heirs for the debts of persons from whom they inherit do not involve a construction of this statute, which determines what assets a creditor is entitled to share in upon the settlement of an estate.

The question here involved was decided in *Snydacker v. Swan Land Co.* 154 Ill. 220, which was a suit upon an assessment of shares of stock where the call was made more than two years after letters of administration were issued. It was held that the judgment could only be satisfied out of estate not inventoried or accounted for within the two years. There had been a decision in *Suppiger v. Gruaz*, 137 Ill. 216, relating to the filing of claims in cases of voluntary assignment, which is one of the cases now relied upon to sustain the errors assigned, but what was said in that case in argument inconsistent with the decision in *Snydacker v. Swan Land Co.* was expressly disapproved in the later case.

The remaining question is whether the 625 shares of stock were owned by Thomas Murdoch and Simon Reid as partners and the liability was a partnership debt for which each partner was liable, or whether Thomas Murdoch and the estate of Simon Reid are each liable for one-half of the unpaid balance. The certificate was issued to them under the name of "Reid & Murdoch." They had partnership property in the grocery business, but this was in no way connected with it, and each paid individually one-half of what was paid on the stock, with the understanding that each should own one-half of it.

A partnership has been defined to be a combination by two or more persons of capital or labor or skill, or some or all of these, for the purpose of business for their common benefit. In this case there was no purpose of that kind and no engagement in a business venture, but the stock was bought merely as an investment. It was a case of two persons buying shares of stock where each owned one-half, and was a case of tenancy in common. *Hurley v. Walton*, 63 Ill. 260; *Gottschalk v. Smith*, 156 id. 377.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

EMMA PETERSON, Admx.

v.

JAMES W. GIBSON.

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. **BENEFIT SOCIETIES**—*beneficiary does not ordinarily have a vested right to mortuary fund.* In benefit societies authorized to furnish benefits to relatives, "devisees or legatees" of members, a beneficiary named in a certificate has no vested right to the benefit fund, but only an expectancy, which is subject to being defeated by the member's exercise of his power of appointment by will.

2. **SAME**—*when power of appointment by will is a vested right.* The power of appointment by will, conferred upon a member of a benefit society by its charter, is a vested right, which cannot be taken away by subsequent enactment unless his contract of membership makes his right in that respect subject to future changes in the laws governing the society.

3. **SAME**—*when member is bound by future by-laws.* It is only when a member in express terms agrees to be bound by such constitutional amendments or by-laws as may thereafter be enacted, that he is bound by subsequent amendments or by-laws which impair the obligations of his contract.

4. **SAME**—*when member does not agree to be bound by future changes in law.* That the certificate provides that the member shall comply with the constitution and by-laws, which constitution provides that it may be amended, does not constitute an agreement to be bound by future changes in the constitution impairing his contract.

Nelson v. Gibson, 92 Ill. App. 595, affirmed.

191	865
e106a	*186
191	865
d212	*324
212	588

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

M. C. HARPER, and O. C. PETERSON, for appellant.

GEORGE G. BELLOWES, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Leander E. Nelson (now deceased) at the time of his death was a member in good standing in the Scardina-vian Mutual Aid Association. He was admitted to membership on the eighth day of November, 1886, and on that day received a mortuary benefit certificate issued by the said association, in the sum of \$3000, to be paid to Eva Nelson, his mother and appellant Peterson's intestate, she having died during the pendency of this proceeding. The said Leander E. Nelson departed this life March 12, 1897, leaving a last will and testament, which was duly admitted to probate. The will appointed appellee, Gibson, executor, and provided that the provision in the benefit certificate making said Eva Nelson sole beneficiary of the mortuary fund should be revoked, and that such fund should be bequeathed and made payable as follows: \$1000 to his mother, said Eva Nelson; one dollar each to Minnie Peterson, Hannah Cederstrom, John Nelson and Gustav Nelson, and the remainder to the appellee, James W. Gibson. Said Eva Nelson, who was then living, asserted a claim to the entire amount of said mortuary fund, and said appellee, Gibson, as legatee under the will of said Leander E. Nelson and as executor thereof, claimed the right to receive all of such mortuary fund above the sum of \$1000, in accordance with the will of the deceased assured. Under a bill of interpleader filed by the association these rival claimants were brought into court and required to submit their contentions to the court for determination. The associa-

tion deposited in court the mortuary fund, less \$13 allowed it for costs in that behalf, and was dismissed from the proceeding. Upon a hearing the chancellor sustained the right of the assured to dispose of the mortuary fund by will, and the decree was affirmed in the Appellate Court for the First District on appeal. This is a further appeal from the judgment of the Appellate Court.

Section 1 of the act of June 18, 1883, (1 Starr & Cur. Stat. 1885, p. 1348,) under which the Scandinavian Mutual Aid Association was incorporated, authorized the association to furnish life indemnity or pecuniary benefits to certain relatives by consanguinity or affinity and to the "devisees or legatees" of deceased members. This section was in full force and in nowise modified or changed when said Leander E. Nelson received his beneficiary certificate, on the eighth day of November, 1886. Nor had the association, by by-law or otherwise, attempted to place any restriction on the right of any member to appoint by his last will a beneficiary other than the person named in the certificate to receive the mortuary fund. In such associations the beneficiaries do not, as a general rule, acquire a vested right to the mortuary fund, but during the lifetime of the member have a mere expectancy only, subject to be defeated by the exercise of the power of appointment which is vested in the member. (*Martin v. Stubbings*, 126 Ill. 387; *Moore v. Chicago Guaranty Fund Society*, 178 id. 202; *Bloomington Mutual Benefit Ass. v. Blue*, 120 id. 121; *Voigt v. Kersten*, 164 id. 314.) The power of appointment thus vested in the assured member may be divested by future changes in the constitution of the association or the organic law under which it was organized, if it was made a part of the contract admitting the assured to membership that his right in this respect should be subject to such future changes in the law governing the association, but otherwise the power of appointment is a vested right and cannot be taken away by any subsequent enactment or change in the laws of

the association. *Voigt v. Kersten*, *supra*; *Baldwin v. Begley*, 185 Ill. 180.

The contention of the appellant is, that the said assured, as a part of the contract admitting him to membership in the association, agreed that he would comply with and be bound by the constitution and by-laws of the association as such constitution and by-laws might or should be amended or changed in the future, and appellant further contends that the constitution and by-laws of the association were subsequently so legally amended and changed as to divest the said member of the right to change the beneficiary by his last will.

The insistence that it was part of the contract that the association reserved to itself power to change and amend the constitution and by-laws, and that the said Leander E. Nelson agreed that power should be so reserved and that he would be bound by the constitution and by-laws as they might be thereafter amended, is based alone upon a clause or provision found in the certificate of membership issued to the said Nelson. The provision in the certificate is as follows: "This certificate is issued upon the condition that the said Leander E. Nelson shall comply with the constitution and by-laws of the association, and that the statements made in the application for this certificate are true." A copy of the constitution and of the by-laws of the association was attached to the certificate of membership and made a part thereof. Section 7 of article 9 of said constitution as it stood at the time said certificate was issued to Nelson was as follows: "The constitution can be amended and changed at the annual meeting of the association by a majority of two-thirds of all the members present." It should here be noted that that which is referred to as the constitution of this association is in no sense the charter of the association. What is here referred to as the constitution is but a code of laws adopted by the association. It was correctly said in *Supreme Lodge v.*

Knight, 117 Ind. 489: "A constitution of a voluntary association or a corporation is nothing more than a by-law under an appropriate name."

The clause in the certificate does not purport to bind the member to the observance of constitutional provisions or by-laws other than such as then existed, and a copy of the so-called constitution and by-laws then in force was attached to the certificate as a part thereof. It was the constitution and the by-laws so made a part of the certificate to which the certificate had reference and which the member consented to obey. It is only when a member, in express terms, agrees to be bound by such constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by-laws which impair the obligations of his contract of membership injuriously. (*Covenant Mutual Life Ass. v. Kentner*, 188 Ill. 431; *Baldwin v. Begley*, *supra*.) In the absence of such an express agreement the contract of membership cannot be impaired by subsequent changes effected by the association. The constitutional provision contained in said section 7 of article 9 of the constitution of the association at the time of the admission of said Nelson to membership in the association, to the effect that the constitution could be amended and changed at an annual meeting of the association by a majority of two-thirds of all the members present, cannot be construed to authorize an amendment or change in the constitution which should act retrospectively and impair the obligation of the contract entered into between the association and said Nelson prior to such amendment of the constitution.

As before remarked, that which is called the constitution of the association is but a code of by-laws adopted by the association. The association had inherent power to enact by-laws consistent with the provisions of the enactment under which it was organized and not repugnant to the constitution of the State of Illinois, and to alter

and amend such by-laws. The by-law incorporated in the code called the constitution, relative to amendments and changes in such code, did not confer upon the association the right or power to make such amendments or changes. The association possessed that power as an attribute of its corporate life. The said section 7 of article 9 of the code of by-laws had no other effect than to declare the mode or manner of exercising the power of amendment possessed by the association, viz., by a majority of two-thirds of all the members present at the annual meeting. If the section had been wholly omitted from the constitution or by-laws the association would have had ample power to pass any lawful amendment of the constitution or by-laws. (Niblack on Benefit Societies, sec. 28, p. 105; 1 Bacon on Benefit Societies,—2d ed.—sec. 9.) The assent of the assured, therefore, did not confer any power on the association which without such assent it had not, nor did it bind the assured to submit to any amendment to which he could not be compelled to submit in the absence of said section 7. His assent was that the association, at any annual meeting, might make any change or amendment lawful to be made, by a majority of two-thirds of all the members present, and cannot be construed as an assent to the adoption of a by-law divesting him of a vested right and impairing the obligation of his contract of membership. Section 14 of article 2 of the constitution of 1870 inhibited the General Assembly from adopting any statute impairing the obligation of such contract of membership. Subsequent enactments of the legislature or future amended by-laws of the association could not operate retrospectively, and thus divest the vested rights of a member or destroy existing contract obligations. In revoking the direction of the certificate as to the person to receive the mortuary benefit, and in appointing others as beneficiaries to receive such fund, said Leander E. Nelson but exercised a legal right of which he was possessed.

A portion of the brief in behalf of appellee is devoted to the criticism of the action of the chancellor in relieving the appellant from the payment of any portion of the cost of the proceeding. The Appellate Court affirmed the action of the chancellor in respect of the order as to costs. The action of the Appellate Court in that respect is not assigned as for error in this court, and for that reason is not subject to review in this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CHARLES F. MORSE *et al.*

v.

THE PACIFIC RAILWAY COMPANY *et al.*

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

This case is controlled by the decision in *Morse v. Pacific Railway Co.* (*ante*, p. 356).

Morse v. Gillette, 93 Ill. App. 23, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

WALKER & PAYNE, for appellants.

FOLLANSBEE & FOLLANSBEE, and HOWARD F. GILLETTE, for appellees.

Per CURIAM: The question involved in this case is the same as the question decided in the case of *Morse v. Pacific Railway Co.* (*ante*, p. 356.) The decision in that case governs and controls the decision in this case. Accordingly, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

SAMUEL DAVIS *et al.*

v.

UPHAM & STONE *et al.**Opinion filed June 19, 1901—Rehearing denied October 9, 1901.*

1. APPEALS AND ERRORS—*rule as to amount involved in mechanic's lien appeal.* Intervening petitions, filed in a mechanic's lien proceeding, on behalf of separate parties, to enforce claims having no connection with each other, are to be treated as separate suits, and the several amounts allowed as liens cannot be added together in order to make the jurisdictional amount necessary to authorize an appeal from the Appellate to the Supreme Court.

2. SAME—*when allowance of a mechanic's lien must be sustained on appeal.* The allowance of a mechanic's lien will be sustained, on appeal, where the objection to the claim is not sufficiently specified in any of the several objections to the master's report.

Davis v. Rittenhouse & Embree Co. 92 Ill. App. 341, affirmed in part.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

ISRAEL COWEN, for appellants.

FRANCIS T. MURPHY, and THADDEUS S. ALLEE, for appellees Upham & Stone.

L. A. McDONALD, for appellee William E. Palmer.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in the circuit court of Cook county by appellees, who were builders and material-men, to establish mechanics' liens against the property of appellants. The original petition was filed by the Rittenhouse & Embree Company for a lien of \$527.19, and in the same cause intervening petitions were filed by James R. Scott, the original contractor, for a lien of \$2486.50; William E. Palmer, also a sub-contractor, for \$1775; Upham & Stone,

sub-contractors under Palmer, for \$245.53, and the Gould Manufacturing Company, a sub-contractor, for \$646.37. The master in chancery to whom the petitions were referred, in his report found the Rittenhouse & Embree Company, Upham & Stone and Palmer entitled to their respective lien claims on an equal footing with each other, together with interest and attorneys' fees, and dismissed the claim of James R. Scott on the ground that he had signed a waiver of lien. The circuit court entered a decree confirming the master's report. The intervening petition of the Gould Manufacturing Company having been dismissed before the hearing, it was contended by the appellants that an attorney's fee should be granted them on that account, but this was denied. The owners of the property then prosecuted an appeal to the Appellate Court for the First District to reverse the finding as to the claims of the Rittenhouse & Embree Company, Upham & Stone and Palmer. The court affirmed the decree below in all respects, except as to the claim of the Rittenhouse & Embree Company, which was disallowed. Appellants now prosecute a further appeal to this court, insisting that the Appellate Court should have also disallowed the claims of Upham & Stone and Palmer, and they again insist on being allowed an attorney's fee to be taxed against the Gould Manufacturing Company.

Upham & Stone make a motion to dismiss this appeal as to them. Their contention is, that the action of the Appellate Court in reference to their claim for lien, in the absence of a certificate of importance, is not subject to review here because the amount is less than \$1000, and because it is a separate and distinct claim from those of the other petitioners. The intervening petitions are on behalf of separate parties, to enforce distinct liabilities. One claim is in no manner connected with the other. As is said in the case of *Farwell v. Becker*, 129 Ill. 261 (p. 269): "Where the amount against each defendant is separate and distinct, as is the case here, the two amounts cannot

be united so as to confer jurisdiction, but each must be treated as a separate suit; and if the amount involved as to either one is not large enough to confer jurisdiction, the appeal must fall,"—citing *Paving Co. v. Milford*, 100 U. S. 147. See, also, *Stettauer v. Boldenweck*, 183 Ill. 187.

The action of the circuit court in refusing to allow appellants an attorney's fee on account of the Gould Manufacturing Company, dismissing their petition before the hearing, is for the same reason not subject to review upon this appeal. As to these claims the appeal must be dismissed.

The Appellate Court has properly disposed of the claim of Palmer upon the ground that the objection of appellants to that claim is not specified sufficiently in any one of the several objections to the master's report. As to that claim the judgment below will be affirmed.

Dismissed in part and affirmed in part.

THE PEOPLE *ex rel.* Raymond, County Treasurer,
v.

G. F. WHIDDEN *et al.*

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. SPECIAL ASSESSMENTS—*proper objections arising after confirmation are available on application for sale.* Objections of a nature to annul the judgment of confirmation and defeat the assessment may be made upon application for judgment of sale, if the facts upon which they are based have arisen since judgment of confirmation.

2. SAME—*court of equity will control manner of performing work while it is in progress.* While the work upon a local improvement is in progress a court of equity has power to control the manner of its performance, upon the application of a property owner assessed to pay for the improvement, to prevent any substantial departure from the terms of the ordinance.

3. SAME—*when objection that improvement was not completed in accordance with ordinance is not available.* If the improvement is the one provided for in the ordinance, and it has been completed and accepted by the city authorities having power to determine whether the contract has been complied with, the objection that the im-

191 374
d198 817
193 4818
191 374
e196 4604
196 4605

191 374
e200 488
e201 487
e201 488
191 374
202 4273
191 374
212 4 80
e212 4508

provement was not completed in accordance with the terms of the ordinance is not available upon application for judgment of sale, even though the contractor has not performed the work as well or with as good materials as the ordinance calls for.

4. *SAME*—limits of rule that objections to manner of completing improvement are not available. The rule that objections to the manner in which an improvement is completed are not available on application for judgment of sale does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied.

5. *SAME*—honest fulfillment of public contract must be enforced by a direct proceeding. While those assessed to pay for an improvement may compel the honest fulfillment of the contract therefor, yet it must be by a proceeding to enforce the performance of the duty which the city owes to the assessed property owners to see that the contract is performed in compliance with the ordinance.

MAGRUDER and HAND, JJ., dissenting.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, and DENIS E. SULLIVAN, (SHOPE, MATHIS & BARRETT, of counsel,) for appellant:

A special assessment, after confirmation, for all purposes of collection is of the same character as a general tax which has received the sanction of a board of equalization or review. *White v. People*, 94 Ill. 604; *Riverside Co. v. Howell*, 113 id. 256; *Davis v. Litchfield*, 145 id. 313; *West Chicago Park Comrs. v. Baldwin*, 162 id. 87; *Railroad Co. v. Joliet*, 153 id. 649; *Brewster v. Peru*, 180 id. 124.

By statute a judgment of confirmation cannot be attacked other than by appeal or writ of error, except for want of jurisdiction in the court rendering it. Hurd's Stat. 1897, sec. 66, p. 369.

No objection to an assessment which does not go to the jurisdiction of the court, and which could have been made at the time of the confirmation proceedings, can be urged to the county treasurer's application for judgment for sale to enforce payment. *Johnson v. People*, 189 Ill. 83;

Blount v. People, 188 id. 538; *Fiske v. People*, id. 206; *Leitch v. People*, 183 id. 569; *Pipher v. People*, id. 436; *McManus v. People*, id. 391.

Where a local improvement, payable by special assessment or special taxation, has been constructed pursuant to legal confirmation proceedings and under a valid ordinance, there can be no defense to an application for judgment against delinquent property upon the ground that the improvement has not been made in accordance with the ordinance. *Ricketts v. Hyde Park*, 85 Ill. 110; *Craft v. Kochersperger*, 173 id. 617; *Callister v. Kochersperger*, 168 id. 334; *Fisher v. People*, 157 id. 85; *People v. Green*, 158 id. 594; *Shannon v. Hinsdale*, 180 id. 202; *Heinroth v. Kochersperger*, 173 id. 205.

The statute makes the board of local improvements the instrumentality by which the contract is let and its proper performance by the contractor secured, and through which the property owner has his remedy in case the work or material does not comply with the requirements of the ordinance or specifications. Its action and acceptance are conclusive upon the property owner. *Hurd's Stat.* 1897, secs. 77-85, pp. 371-375; *Ricketts v. Hyde Park*, 85 Ill. 110; *Callister v. Kochersperger*, 168 id. 334; *People v. McWethy*, 177 id. 341; *Heinroth v. Kochersperger*, 173 id. 205; *Haley v. Alton*, 152 id. 113.

HAMLIN, SCOTT & LORD, and GEORGE E. NEWCOMB, (JOHN H. HAMLIN, of counsel,) for appellees:

Where the improvement has been completed and accepted by the municipality, the property owner assessed therefor may, upon application for a judgment of sale, object that the improvement, in its nature, character, locality or description, differs from that called for by the ordinance. If the evidence supports the objection, the burden is then imposed upon the applicant to show that, notwithstanding such deviation as to its nature, character, locality or description, the improvement as made is

substantially that called for by the ordinance, and that such deviation has not operated to the injury of objector's property, and that the pavement as completed is not less beneficial to the objector's property than would be a pavement constructed in literal compliance with the terms of the ordinance as to nature, character, locality or description. Hurd's Stat. 1895, sec. 19, art. 9, p. 280; Hurd's Stat. 1899, secs. 8, 85, pp. 363, 380.

The statute does not permit the board of local improvements to waive these requirements. Dillon on Mun. Corp. (2d ed.) sec. 921, p. 1117; *Church v. People*, 174 Ill. 366; 179 id. 205; *Pells v. People*, 159 id. 580.

Objections have always been sustained, and for the same reason, where the ordinance does not distinctly state the nature, character, locality or description of the proposed improvement. *Cass v. People*, 166 Ill. 126; *Otis v. Chicago*, 161 id. 199; *People v. Hurford*, 167 id. 226.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Cook county sustained objections of appellees to the application of the county treasurer for judgment against their real estate to satisfy the first installment, and interest on deferred installments, of a special assessment levied to pay the cost of paving West Lake street, in Chicago, between Ashland avenue and Western avenue, and denied said application for judgment.

The ordinance for the improvement provided for grading, and paving with vitrified brick, the roadway of said street forty-eight feet in width, together with the wings of intersecting streets and alleys, and specified particularly how and with what materials the improvement should be made. Application was made to the county court for the levy of the assessment to pay for the improvement, and it was levied and confirmed, and there is no question of the regularity of that proceeding. A contract for making the improvement according to the ordi-

nance was awarded to the Gaffney & Long Construction Company, and the improvement was completed and accepted by the city. The objections which were made and sustained were, that the improvement was not made and completed in the manner and with the quality of materials specified in the ordinance.

The ordinance provided that the curb walls then in place on each side of the roadway should be plastered on their street face, from their top surface down five feet. They were not so plastered, but were frequently plastered only in spots, or from two and a half to three and a half or four feet. The plaster was to be made of one part best quality of Portland cement and two parts clean, sharp, lake shore sand. The cement used in the plaster was not Portland cement. The ordinance called for a pavement twelve inches thick, and as laid it was not of that thickness throughout, but in some places was only eleven inches thick. The ordinance required a concrete foundation bed six inches thick, and a good part of it was five to five and a half inches in thickness. The concrete was to be made of one part best Portland cement, three parts clean, sharp sand and seven parts broken limestone. The required proportion of cement was not used and the quality was not the best Portland. In almost the whole improvement no sand was used, but limestone screenings were used in the place of sand, with less cement and in greater proportion than the sand called for by the ordinance. The improvement as completed was not of the quality provided for by the ordinance, from the use of inferior materials, the want of thickness of the pavement and the failure to plaster the curb walls as required. The only question is whether these objections are available to the property owner on the application of the county treasurer for judgment.

If the objections are of a nature to annul the judgment of confirmation and defeat the assessment they may be properly made on the application, for the reason that

the facts upon which they are based have arisen since the judgment of confirmation. That judgment cannot be collaterally attacked except for matters going to the jurisdiction of the court rendering it, but the land owner is only concluded by it as to proceedings up to the time it is entered. All proper objections and defenses arising subsequently can be interposed to the application for judgment for sale. (*Boynton v. People*, 159 Ill. 553.) In this case, the property owners whose lands were specially assessed upon an estimate for a certain improvement did not receive as good an improvement as was provided for and estimated. It need not be said that they were entitled to have the improvement of equal quality and in substantial conformity with the provisions of the ordinance, and that the city of Chicago had no power to change it in any material respect. Neither are the laws so deficient that the property owners had no remedy for any departure from the provisions of the ordinance which would make the improvement less durable and beneficial to them. The law has charged the city authorities with the duty of seeing that a contract is let and performed in compliance with the terms of the ordinance. While the work is in progress and a court of equity can control the manner of its performance the court will interfere at the application of the property owner who has been assessed to pay for the improvement, to prevent any substantial departure from the terms of the ordinance and to enforce the duty of the city towards him. (*Fisher v. People*, 157 Ill. 85; *People v. Green*, 158 id. 594; *Callister v. Kochersperger*, 168 id. 334; *Heinroth v. Kochersperger*, 173 id. 205.) In this case no steps were taken to compel a compliance with the terms of the ordinance or to prevent a deviation from them. While the work was in progress, an alderman, in the interest of the property owners, employed a civil engineer to inspect the work and to make report to him. The engineer reported, from time to time, the failure of the contractor to perform the work accord-

ing to the specifications, and such failure was presented to the city authorities but without any substantial result. The question now is whether the objection, which could have been made by a bill for injunction before the work was completed, is admissible on the application of the county treasurer for judgment for sale.

The rule seems to be, that while the honest fulfillment of a contract for public work may be enforced by those who are assessed to pay for it, it must be by a proceeding to enforce the performance of the duty. If the improvement is the one provided for in the ordinance, and it has been completed and accepted by the city authorities invested with power to determine whether the contract has been complied with, the objection that it was not completed in compliance with the terms of the ordinance is not available. *Ricketts v. Village of Hyde Park*, 85 Ill. 110; *Fisher v. People*, *supra*; *People v. Green*, *supra*; *Cooley on Taxation*, 468.

The rule that objections to the manner in which an improvement is completed are not available on the application for judgment for sale does not extend to cases where the improvement authorized is changed for another, or where the city authorities accept a different improvement from the one for which the assessment was levied. A case of that kind was under consideration in *Pells v. People*, 159 Ill. 580. An ordinance was passed for the construction of a brick pavement in Market street, in the city of Paxton, sixty-one feet in width, and property was assessed to pay for it. After the assessment was confirmed by the county court the city council passed another ordinance which substituted a pavement fifty-three feet wide, and there was an attempt to enforce the judgment of confirmation as to one improvement to pay for the substituted improvement. The ordinance providing for a different improvement operated as an annulment of the original ordinance and the assessment made under it. It was held that the city could not abandon

the improvement provided for and substitute another and enforce the judgment of confirmation by a sale. Akin to that question was the one raised in *Church v. People*, 174 Ill. 366. In that case the assessment was levied to pay for a pipe sewer, which the ordinance required to be laid twenty-one feet from the line of South boulevard, in the town of Cicero. A sewer was laid five feet nearer to said south line, under a resolution of the board of trustees authorizing it to be laid in that place. It was held to be a question of fact whether the ordinance and judgment of confirmation were properly applicable to the sewer as constructed, or whether the authorities had accepted something else and less beneficial than the sewer provided for. The rule was there repeated that it is no defense to an assessment that the contract for the work was not performed according to its terms, but that a municipality cannot obtain authority to construct an improvement and assess an owner, and then construct another and different improvement and acquire a lien upon the property to pay for it. In this case the improvement was the identical one provided for in the ordinance, but the contractor failed to perform the work as well or with as good materials as the ordinance called for. The improvement as completed was the same vitrified brick pavement provided for by the ordinance, but it was not as good or beneficial to the property owners as they were entitled to. The evidence did not show that the improvement was a different improvement from that authorized by the ordinance, and the objections sustained could not be made on application for judgment after the work was completed and accepted.

The judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

MAGRUDER and HAND, JJ., dissenting.

191	882
105a	53
191	882
208	144

DANIEL WATSON

v.

JULES F. ROTH, Special Admr.

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. SPECIAL INTERROGATORIES—*when answer relates to ultimate fact.* In an action to recover money loaned by the defendant, as agent for plaintiff's intestate, to insolvent parties, where the issues are the existence of a promise or duty on the part of the defendant to use due care in making the loan and his failure to exercise such care, the answer "no" to the special interrogatory "was Daniel Watson [the defendant] reasonably prudent and careful in making the loan in question?" is not objectionable as relating to an evidentiary and not an ultimate fact.

2. PRINCIPAL AND AGENT—*agent to loan money must exercise reasonable care.* A banker engaged in loaning money as agent for a customer must use the ordinary care and prudence common to bankers to guard against loaning the money to insolvent parties.

Watson v. Roth, 91 Ill. App. 111, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. F. BOOKWALTER, Judge, presiding.

H. M. STEELY, and O. M. JONES, for appellant.

PENWELL & LINDLEY, and S. A. BRISTOW, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee brought this suit, as administrator of the estate of Nancy A. Gilbert, in the circuit court of Vermilion county, against appellant, to recover \$3000 loaned by appellant, as the agent of said Nancy A. Gilbert, to Dwiggins Bros. The original declaration consisted of the common counts, but on the trial the plaintiff was permitted to add three special counts charging the defendant

with negligence in making the loan to Dwiggins Bros., who were alleged to have been insolvent, by means whereof the money loaned was lost. The defendant's pleas were the general issue and what his counsel call a plea of tender. Issue was joined on the plea of the general issue and replications were filed to the plea of tender traversing its allegations. On the trial there was a verdict for the plaintiff for \$3000, upon which judgment was entered. The Appellate Court affirmed the judgment on appeal, and this further appeal was prosecuted.

The plea of tender alleged that the defendant had in his hands, as assets belonging to the estate of Nancy A. Gilbert, only the note of Dwiggins Bros. for \$3000, given for the money loaned, and two other notes described in the plea, and \$2097.20 in cash, which he had offered to the plaintiff and brought into court. At the trial the court permitted the plaintiff to reject the note of Dwiggins Bros. which was the subject of the suit, and to accept the other notes and money, and to this ruling the defendant excepted. It is claimed that plaintiff could not accept part of the tender and refuse to accept the remainder. The two notes and the balance in cash which were brought into court with the Dwiggins note were not in any way connected with the subject matter of the suit. There was no controversy between the parties as to those notes and that money, but they were separate and distinct items of property conceded to belong to the plaintiff. No authority is cited in support of the rule contended for, and no reason is given why the defendant could make the acceptance of the other notes and money conditional upon the acceptance of the Dwiggins note which had been repudiated and rejected by the plaintiff. We do not see how the rule that a legal tender in satisfaction of an alleged indebtedness must be accepted or refused as a whole can be applied here, and there was no error in the court allowing the plaintiff to take the notes and money conceded to belong to him and not connected with the

litigation, without compelling him to take the note which was in dispute.

It is also contended that there was a variance between the allegations and the proof, because the declaration alleged a special promise by the defendant to Nancy Gilbert to use reasonable care and diligence in loaning her money, while the evidence tended to establish facts from which the law would imply a promise or duty to use such care and diligence. The question sought to be raised was not presented in the trial court either by objection to the evidence when offered, or motion to exclude it, or in any other way. The trial court did not pass upon the question of a variance, and there is no ruling on the subject in the record. If there is any force in the argument, the question is not open to review here. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540.

The next complaint is, that the court gave to the jury, at the request of plaintiff, the following special interrogatory: "Was Daniel Watson reasonably prudent and careful in making the loan in question to Dwiggins Bros.?" The answer was "No." The objection made is, that the interrogatory relates to and calls only for an answer as to an isolated evidentiary fact and not to any ultimate fact in the case. Under the issues formed, the existence of the promise or duty, the insolvency of Dwiggins Bros. and the want of reasonable care and diligence on the part of the defendant were ultimate facts affirmed by the plaintiff and denied by the defendant. The question submitted related to one of these ultimate facts upon which the rights of the parties depended. It was one of the ultimate facts in issue, and there was no error in submitting it. The answer was consistent with the general verdict:

The court refused to give an instruction requested by the defendant, stating that if the jury believed that Dwiggins Bros. had been adjudged bankrupts, then before the plaintiff could recover he must show that he had

proved his claim against the estate of Dwiggins Bros. and realized all that was possible thereon from said estate, so as to fix the amount of damages or the amount due him. It is argued that the amount of loss not having been ascertained, the suit is premature and could not be maintained, and that until the estate of the bankrupts should be settled there could be no determination of the plaintiff's damages. There was neither pleading nor evidence upon which to base the instruction. One of the Dwiggins brothers incidentally stated in his testimony that he had been declared bankrupt; but what had been done, if anything, in that proceeding, or what, if anything, would be paid upon the indebtedness of Dwiggins Bros., in no way appeared. The plaintiff claimed that the defendant, as Mrs. Gilbert's agent, had so negligently performed his duty that plaintiff was not bound to accept the Dwiggins note and he had refused to receive it. The note had not been in the possession of the plaintiff, and he had done nothing in affirmance or ratification of the loan. If, under any circumstances, a plaintiff would be bound to pursue the estate of a bankrupt and recover what could be obtained in that way, there was no such duty here.

Objection is made to instructions given at the request of plaintiff, on the ground that they ignored the defense that Mrs. Gilbert authorized or instructed the defendant to loan the money in question to Dwiggins Bros. The defendant is a banker doing business at Rossville, and Mrs. Gilbert was his customer. She had been sick and had been in Florida, and had gone to California in the fall of 1896, where she remained. The loan was made on June 20, 1898. The alleged defense which, it is said, the instructions ignored, rested only on the testimony of Alvin W. Gilbert and a letter of Mrs. Gilbert. Alvin W. Gilbert testified that in the fall of 1896, before Mrs. Gilbert left for California, she spoke to the defendant at the house of the witness about the loan of some money that

would be paid in shortly. She asked defendant if he had any person in view, and he said he did not know of any one then unless it was the Dwiggins brothers, who had spoken to him about money. He said that Charles Dwiggins sold a farm and came there and put it in the store and he considered them good, and she said she thought they were and she knew them. She said she guessed they were all right and he could loan it. The letter was written from California to defendant, dated June 11, 1897, in which Mrs. Gilbert said: "You can let Mr. Dwiggins have that money when it is paid in, if he still wants it." This evidence was all there was tending to show that defendant was merely following the directions of Mrs. Gilbert. The letter was written more than a year before the loan, and the conversation was many months previous to the letter. If it could be said that the evidence fairly tended to establish the alleged defense, it was presented to the jury by an instruction that if Nancy Gilbert, either in person or by letter, authorized or instructed the defendant to loan the money to Dwiggins Bros. or to Mr. Dwiggins, one of the firm, and did not require sureties upon the note, he would have the right to loan the money to such person or persons without security and would not be responsible to Mrs. Gilbert or the plaintiff for the loss sued for. The instructions given at the instance of plaintiff did not direct a verdict upon finding the facts according to plaintiff's theory, but they made no reference to the question whether defendant made the loan by direction of Mrs. Gilbert. Taking the instructions together, they are not of such a character as to mislead the jury upon the question whether the defendant was merely carrying out instructions. The court refused some instructions on the question of the liability of the defendant if the evidence showed that he used such care as a reasonably prudent person would have used and exercised in making the loan, but the principle contained in them was sufficiently covered by the first

and second instructions given at the request of defendant. We find no error in the rulings on the instructions.

Defendant made his motion for a new trial, which was overruled November 23, 1899. He excepted to the ruling, and judgment was entered against him for \$3000 and costs of suit, to which judgment he excepted and from which he prayed an appeal. On December 9, 1899, he made a motion to set aside the former order and for a new trial upon the ground of newly discovered evidence. This motion was overruled, and defendant excepted. On the hearing of the motion, defendant showed by affidavits that after judgment was entered he found a letter from Mrs. Gilbert to him, written from Los Angeles, California, and dated May 9, 1898, as follows:

"Mr. D. Watson:

"DEAR SIR—I received your letter of march the 28 i was glad to hear you was all well I was in hopes Mr. Cadwalder would keepe that money but if you dont get that farm loan I think you had better let Mr. Dwiggins have it I wrote to the foulks about him & they say he is all right I see that he is running that big store there yet. keepe it out on as long time as you can there is so many bank robbers & you cant tell how soon they will strike Rossvill."

The affidavit of defendant shows that he kept his correspondence at the bank and made repeated and diligent searches for the letter in all places where his correspondence or papers were usually kept and where he thought the letter could possibly be, but was unable to find it and believed it to be lost; that after the judgment his foster-daughter reminded him of the fact that he had given her a letter from Mrs. Gilbert containing flower seed for her, which had been placed with rubbish in the garret of his residence, and that search was made for the letter and it was then found. We think the affidavit showed that the evidence could not have been discovered before the trial by the exercise of proper diligence, but we do not think that it fulfills the further requirement that it would

probably change the result if a new trial should be granted. It shows that Mrs. Gilbert had made some inquiry of other parties concerning Mr. Dwiggins and had been informed that he was all right, but the defendant's affidavit shows that he did not understand the letter as directing the loan to be made to Dwiggins Bros. on her judgment, for he afterward wrote her, on June 7, 1898, that he failed to make collections in time to secure the farm loan, and if an opportunity did not present itself between that time and July he should invest the money in B. and L. orders bearing seven per cent, which he considered safe. The evidence at the trial established beyond question that the Dwiggins brothers were heavily involved when the loan was made; that they did business with the defendant, and that he was well aware of such facts that no prudent business man would have loaned the amount of money he did without security upon a common note due in two years after its date. They were running a store and their indebtedness was about \$24,400, \$9000 of which was due to the defendant. He probably did not know of \$5000 of the indebtedness, but he knew that they owed over \$19,000 and that they were not worth enough above their indebtedness to justify such a loan. He could not have regarded the loan other than as a precarious one, and the money obtained from it was applied upon an indebtedness due him or for which he was liable. He certainly knew that if Mrs. Gilbert was aware of these facts she would not make the loan, and if the letter were in evidence we cannot say that a jury would probably believe that a reasonably prudent and careful man, acting for another and situated as the defendant was, would have made the loan. It was his duty to exercise the ordinary care and prudence common to bankers in making the loan, and as we do not regard it probable that the newly discovered evidence would change the result, it was not ground for setting aside the judgment and granting a new trial.

The substantial questions upon the merits of the case are questions of fact, upon which the judgment of the Appellate Court is final, and we find no error in the record justifying the reversal of the judgment. The judgment is therefore affirmed.

Judgment affirmed.

G. R. HAWKINS *et al.*

v.

ANDA F. BURWELL.

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

APPEALS AND ERRORS—*no appeal lies from order refusing to dissolve injunction in vacation.* No appeal lies from an order of a circuit judge granting or refusing to dissolve an injunction in vacation, since the act of June 14, 1887, allowing appeals from interlocutory orders, applies only to orders entered in term time.

Burwell v. Hawkins, 92 Ill. App. 459, reversed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding.

J. E. JENNINGS, and FRANK SPITLER, for plaintiffs in error.

R. M. PEADRO, and M. A. MATTOX, for defendant in error.

Mr. JUSTICE HAND delivered the opinion of the court:

On June 18, 1900, in vacation, Hon. W. G. Cochran, one of the judges of the sixth circuit, upon the application of the plaintiffs in error, in a cause in chancery then pending in the circuit court of Moultrie county, made an order for a preliminary injunction restraining defendant in error from sitting in the city council of the city of Sullivan as a member thereof, and from acting as an

191	389
100a	1110

191	389
112a	613

alderman of the third ward of said city, and from voting as a member of said council, and from taking any part in the proceedings of the council or standing committees thereof, until the further order of the court. On September 7, 1900, in vacation, said judge overruled the motion of the defendant in error to dissolve said injunction. To reverse the orders granting said injunction and refusing to dissolve the same the defendant in error prosecuted an appeal to the Appellate Court for the Third District, which court, after overruling a motion to dismiss said appeal for want of jurisdiction, reversed said cause without remanding the same, from which judgment of reversal the plaintiffs in error have prosecuted this writ of error,

The Appellate Court erred in overruling the motion of plaintiffs in error to dismiss said appeal. The right of appeal can be exercised only when conferred by statute, and there is no statute in force in this State allowing appeals from the orders of circuit judges granting or refusing to dissolve injunctions in vacation. In *Greve v. Goodson*, 142 Ill. 355, we say: "The right of appeal is purely a statutory one, and there is no provision of our statute allowing appeals from the orders of circuit judges granting or dissolving injunctions in vacation. The order, in such case, is not the judgment or decree of a court, but only the order of an officer of a court made by virtue of a statute conferring certain powers upon judges of circuit courts in vacation." The act of June 14, 1887, allowing appeals from interlocutory orders, applies only to orders entered in term time, and not to orders entered in vacation.

The judgment of the Appellate Court will be reversed and the cause remanded to that court, with directions to dismiss the appeal.

Reversed and remanded, with directions.

ROLLIN MATHEWSON, EXR *et al.*

v.

GEORGE P. DAVIS *et al.**Opinion filed June 19, 1901—Rehearing denied October 10, 1901.*

1. TRUSTS—*when trustee is not chargeable with interest.* Where the only duty of one receiving a deposit of money on trust is to be always ready to pay it over whenever the beneficiary is entitled to it, he is not ordinarily chargeable with interest.

2. SAME—*when mingling of trust funds does not create liability for interest.* One who receives money under an agreement to pay the same over to a party when the title to certain property should be cleared, is not liable for interest before such title is clear, although he deposited the money, with other funds, in his own name, where it appears there never was a time after the deposit was made that his check for the amount would not have been honored by the bank where the money was deposited. (MAGRUDER, J., dissenting.)

3. SAME—*when executors are chargeable with interest for withholding trust fund.* Executors are chargeable with interest upon a fund which was held by their testator, to be paid over by him to a certain party as soon as the title to certain land was perfected, where, though the title to such land was perfected by limitation soon after their testator's death, they refused to pay over the money until deeds were made or some proceeding was had to perfect the title; but such action is not ground for compounding interest.

4. SAME—*equity will not compound interest except in a case of gross delinquency.* A court of equity has power to compound interest annually or at shorter periods, according to the delinquency of the trustee; but interest will not be compounded except in cases of gross delinquency.

Mathewson v. Davis, 91 Ill. App. 153, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding.

RALPH F. POTTER, for appellants:

Trustees, and others sustaining a fiduciary and confidential relation, cannot deal on their own account with the thing or the person falling within that trust relationship. And it avails nothing that the intentions of the

trustee are honest. *Thorp v. McCullum*, 1 Gilm. 625; *Dennis v. McCagg*, 32 Ill. 445; *Miles v. Wheeler*, 43 id. 126; *Michoud v. Girod*, 4 How. 503.

Executors are charged with the administration of a trust of which their testator was trustee, on its original terms. 1 Perry on Trusts, secs. 264, 343, and cases cited; *DePeyster v. Ferrers*, 11 Paige's Ch. 13; *Schenck v. Schenck's Exrs.* 16 N. J. Eq. 174; *Seymour v. Freer*, 8 Wall. 218.

A trustee or other fiduciary must not mingle trust funds with his own, and is prohibited from gaining any advantage to himself from the use of the fund. 1 Perry on Trusts, secs. 447, 454; 2 Pomeroy's Eq. Jur. secs. 1076, 1077; *Seymour v. Freer*, 8 Wall. 218.

When a trustee or other fiduciary uses trust funds in his personal business, all profits from such use belong to the beneficiary. 2 Pomeroy's Eq. Jur. secs. 1052, 1075; 1 Perry on Trusts, secs. 427, 429; *Barney v. Saunders*, 16 How. 543; 2 Story's Eq. Jur. sec. 1276.

Where trust funds are used in the personal business of the trustee and no account of profits is rendered, the beneficiary is entitled to interest with annual rests, for the burden of proof is on the trustee to show that he has made no profits or received no benefits from the money; and if he refuses to account or show the amount of profit received the court will give compound interest, in order that it may be certain that the *cestui que trust* gets the profits from the trade or business in which the trustee has employed the money. 1 Perry on Trusts, sec. 271; *Ogden v. Larrabee*, 57 Ill. 398; *Hurd v. Goodrich*, 59 id. 450; *Asay v. Allen*, 124 id. 391; *White v. Sherman*, 168 id. 604.

JOHN E. & MAYNE POLLOCK, for appellees:

The complainants in this cause ask for an accounting of a matter which has negligently been let run for over thirty years, when the lapse of time, which has carried with it the life and memory of witnesses, makes it now impossible to render any account. Under these circum-

stances they are precluded by their *laches* from having an account in respect to the interest on this money. *God-den v. Kimmell*, 99 U. S. 201; 12 Am. & Eng. Ency. of Law, 550; *Lyon v. Chase*, 51 Barb. 13; *Dickerman v. Burgess*, 20 Ill. 266; *Ellison v. Moffatt*, 1 Johns. Ch. 47; *Lloyd v. Kirkwood*, 112 Ill. 339.

The only duty of Judge Davis or his representatives in this case was to have the money always ready at their command when it should be legally demanded of them, and under such circumstances they are not to be held accountable for interest. *Meek v. Allison*, 67 Ill. 46.

The deposit of this money in Judge Davis' individual name is not sufficient to charge him with interest on the same. *Estate of Schofield*, 99 Ill. 513.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The controversy in this case is over the question whether appellees, as executors of the will of David Davis, deceased, are liable to appellants for interest upon a sum of money deposited with said David Davis to be held by him until the title to a tract of land should be perfected, and if liable for interest, for what period it shall be charged, and whether it ought to be compounded.

In the year 1865 Brockholst Mathewson, of Johnston, Rhode Island, was the owner of eighty acres of land in Christian county, in this State. David Davis, of Bloomington, had sustained some business relations with Mathewson, and through his agency a contract for the sale of the land was made to William A. Goodrich. Mathewson died before a deed was executed, giving all his property by will to his brothers, George and Rollin Mathewson, who were named executors of the will. George Mathewson died before the testator, and Rollin Mathewson was the sole executor. The deed could not be obtained from the heirs of George Mathewson, and on February 13, 1867, Judge Davis wrote to Rollin Mathewson, the executor, as

follows: "The land is unoccupied and can't be protected unless a written contract is given to Mr. Goodrich reciting the payment of money and that the deed will be made as soon as it can be done. This you can execute by signing, sealing and acknowledging as executor of your brother's will. I will get the money from Goodrich and retain it until the title is perfected, when I deliver him such a contract or bond for the deed. I have paid the taxes for many years for your brother at his request and am continuing to pay them. Be good enough to make out such a contract and enclose it to me. Goodrich will not hold his offer good much longer. Of course, I wish to be refunded the money I have paid for taxes, but I want to get rid of the matter also. I have kept the business in charge for your brother on account of my old business relations with him. I can deposit the money in bank where I live, to await the transmission of your deed. This letter is written in presumption that you cannot now perfect the title."

On May 28, 1867, Judge Davis received \$880, the purchase price of the land, to hold the same, as proposed in his letter, until the title should be perfected in the purchaser, William A. Goodrich. The money was deposited by Judge Davis to his credit in his own account at the First National Bank of Bloomington, and the taxes referred to in his letter, which he had paid, amounted to \$51.28. William A. Goodrich went into immediate possession upon his purchase and afterwards sold the land to H. L. Vandever, who conveyed it to E. A. Vandever. Said William A. Goodrich or the said grantees have ever since had possession of the land and received the rents and profits thereof. The money remained on deposit with Judge Davis according to the agreement, and nothing was done towards perfecting the title or making the deed. The only thing that appears to have been done up to about the time of the death of Judge Davis, in the year 1886, was that Rollin Mathewson wrote him,

inquiring about the matter, early in 1871, and afterward Davis replied that if he would have the deed made for the premises and sent to him he would bring the matter to a close. No deed was made, and the executor left the money on deposit with Judge Davis, as before.

Judge Davis died on June 26, 1886, leaving a will, of which the appellees are surviving executors. From the death of Judge Davis a correspondence was kept up between his executors and Rollin Mathewson, the executor of Brockholst Mathewson, in which the latter sought to secure payment of the money. No deed had been made, but the executors of Judge Davis admitted that the Statute of Limitations had perfected the title to the land, after twenty years' possession, in Goodrich and his grantees. They acknowledged that Goodrich had paid for the land and that he and his grantees had been in possession over twenty years and had put on valuable improvements, and that the title was perfect, but they insisted on having some proceeding in chancery or a deed from all the heirs of Brockholst Mathewson, and refused to pay over the money without having the title perfected by such proceeding or deed. The correspondence continued, Rollin Mathewson insisting upon payment, and in 1897 Goodrich and the present owner released all claim to the purchase price. A satisfactory conveyance was made to E. A. Vandever, the owner of the land. This suit was then commenced by the filing of a bill by Rollin Mathewson in his own right and as executor, and by the heirs of George Mathewson, the appellants, against the executors of Judge Davis, appellees, for an accounting and payment of the fund, with interest, and for general relief. The cause was referred to a master in chancery, who took the evidence and reported, recommending a decree for \$828.72,—the amount of the deposit less the taxes,—and also for interest on said sum at six per cent for six years, five months and seven days. The master stated that he arrived at this period for which interest

was charged by taking the pass-books of Judge Davis in his account with the First National Bank, and when the account was balanced on the pass-book and showed a balance of less than the amount of the fund he took the period up to the next balancing when the balance was more than that sum. Adding these periods together during the thirty-three years that the money had been deposited, they amounted to six years, five months and seven days. The circuit court sustained an exception to the report on the subject of interest, and held that appellees were not liable for any interest, and entered a decree for \$828.72 against them, with the costs of the proceeding. The Appellate Court for the Third District reversed the decree of the circuit court and sustained the report of the master, and directed the circuit court to enter a decree for the sum recommended by the master, \$1145.72, with interest on the principal sum from the date of the master's report at six per cent, and all the costs except such as were made by improper joinder of the other appellants with the executor as complainants.

The claim of appellants is, that they are not only entitled to the fund which Judge Davis received under the agreement to hold and pay over to them when they should make the title perfect, and which fund passed to his executors, but also interest thereon from May 28, 1867, and that such interest should be compounded at the legal rate, with annual rests. The basis of this claim is, that it was a violation of the trust by Judge Davis to deposit the money with his other funds in his own name; that he thereby became liable to pay interest on the fund, and that appellees must therefore pay interest from the date when Judge Davis converted the fund to his own use by depositing it to his personal account. It is not claimed that it was the duty of Judge Davis to invest the fund or to make it bear income for the benefit of appellants or any other person, and it is clear that his only duty was to have the money ready to be paid over when the

title should become perfect and it should be called for. Judge Davis was a very large stockholder in the First National Bank and generally had a large deposit of money to his credit, and there was never a time after the fund was deposited with him that his check, or that of his executors, for the amount would not have been paid. Deposits in the bank were very largely in excess of the amount during a long period of years and only fell below it a few times, and there is no evidence that Judge Davis or his executors did not at all times have the amount of money on hand to meet the obligation. In any view of the law, the theory adopted by the master and approved by the Appellate Court was improper and illogical. If appellants' contention is correct, and Judge Davis became liable for interest because he mingled the fund with his other moneys and thereby converted it to his use, it would not relieve him or his estate from the liability because he was a man of wealth or because his estate was sufficient to re-pay the money. The fact that he had a large bank account would make no difference, and afford no ground for relieving him from interest when the account was large and requiring him to pay it when the account was small. The fact of the balance in the First National Bank would not show that Judge Davis or his executors did not have money on hand to answer the obligation, and if it had been shown that Judge Davis or his executors had no other money, the pass-book did not show the amount in the bank except on certain specified days from five to six months apart. The master assumed that if the balance was less than the sum on a certain day it remained so until the next balance, several months afterward, although the books showed large deposits immediately after such balance was struck.

We are of the opinion, however, that neither Judge Davis nor his estate became liable to appellants for interest, under the facts of this case, until appellants became entitled to the money, under the agreement, by the

title becoming perfect. Generally, the fund in the hands of a trustee is to be loaned or invested, so that it shall produce income for some beneficiary. Generally, it is the duty of the trustee to use diligence that the trust property may increase or produce income for the beneficiary entitled to such income or accumulation. If the trustee lets money remain in his hands unproductive, or if he converts it to his own use, he is liable for interest. In this case the deposit was under an express agreement, and it was not permanent in its nature but for a purely temporary purpose, and Judge Davis was liable to be called upon for the fund any day. If the title to the land should not be perfected the money would never become the property of appellants, and it did not, in fact, belong to them until the title became perfect. It was not within the scope of the agreement or trust that the money should be loaned or increased or that it should produce income, and the only duty of Judge Davis or his executors was to always hold themselves in readiness to pay it when the event should occur. If that was done there would be no breach of duty toward appellants, whose only right was to receive the money upon compliance with the agreement. Up to the time that the title became perfect there was no withholding of money from appellants, and their right was enforceable only upon perfecting the title. Where the only duty of a person is to be always ready to pay over money whenever another is entitled to receive it, he is not ordinarily chargeable with interest. (*Meek v. Allison*, 67 Ill. 46; *Estate of Schofield*, 99 id. 513.) The evidence does not show that Judge Davis or his estate did not have the amount of money on hand at all times, but, on the contrary, they were always able to pay it over and their check would have been good for the money at any time.

There were difficulties in the way of making the title good by conveyance, but it became good under the Statute of Limitations as early as January 1, 1888. Rollin

Mathewson, the executor, was demanding the money and endeavoring to get it, and the appellees had full information of the facts. Goodrich and his grantees had been in possession of the premises for more than twenty years and the title had become perfect in them, so there was no good reason why the money should not have been paid. In the correspondence the executors practically conceded that the title was good under the Statute of Limitations, and it was clearly good by the twenty years' possession if not by possession under the color of title. If Judge Davis had lived the claim undoubtedly would have been paid at that time, but his executors retained the money, insisting upon deeds from all the heirs or some sort of a proceeding in chancery. The fund was withheld by appellees without sufficient cause, and they should be charged at the rate of interest fixed by the statute from January 1, 1888. We do not think that the interest ought to be compounded. A court of equity has power to compound interest annually or at shorter periods, according to the delinquency of a trustee, but interest will not be compounded except in cases of gross delinquency. (*Hurd v. Goodrich*, 59 Ill. 450.) Although we hold that the title to the land became perfect, there was some color for the claim of the appellees that a deed should be made or a proceeding in chancery instituted, and we are not disposed to charge them with compound interest.

Appellees have assigned a cross-error that a court of equity has no jurisdiction because there was a remedy at law and the claim was not proved against the estate in the probate court. The jurisdiction of a court of equity was questioned by demurrer, but on the demurrer being overruled, appellees answered without preserving the question in their answer. They submitted to the jurisdiction of the court, and it was only after the close of the testimony that they sought to raise it again by amendment. It was then too late. The subject matter of the suit is not foreign to the jurisdiction of a court of

equity. Furthermore, appellees have waived all questions of jurisdiction if the case is decided as they claim it ought to be and they are not held liable for more than the principal sum. They waived the question in the circuit court, renewed the offer in the Appellate Court and again make it here. Appellees also say that appellants are precluded from having any right by negligently allowing their claim to run for over thirty years; but as to this they concede the jurisdiction and appellants' right so far as the principal sum is concerned. The cross-errors are overruled.

The judgment of the Appellate Court and the decree of the circuit court are each reversed and the cause is remanded to the circuit court, with directions to enter a decree against appellees for \$828.72, with interest at the rate allowed by the statute from January 1, 1888, and for the costs of the suit.

Reversed and remanded.

Mr. JUSTICE MAGRUDER dissenting to so much of the opinion as holds that Judge Davis should not be charged with interest:

Any man who, as attorney or agent or trustee, becomes possessed of another man's money is chargeable with interest upon such money during the time he holds it, if he deposits the same in his private bank account and mingles it with his own funds, and by drawing checks against it and such funds from day to day uses it in his own private business or for his own private purposes and in aid of his individual operations. In order to avoid liability for such charge he must keep a separate deposit of such money in some reasonably safe depository, either in the name of his principal, or in his own name as agent, attorney or trustee. Such course was not pursued here; and however innocent Judge Davis might have been of intentional wrongdoing, his estate should be charged with interest during the time he kept the money and mingled it with his own funds and used it as his own.

OSCAR A. LEWIS

v.

MARY T. MCGRATH *et al.*

191	401
205	*270

191	401
212	863

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. **CONVEYANCES**—*conveyance is binding upon grantor though in fraud of creditors.* A conveyance of property from husband and wife to a third person, and by him to the wife, in order that she and her children might own the property and hold the same against the husband's creditors, is binding and valid as to the husband and those claiming under him, although it may have been fraudulent as to his creditors.

2. **SAME**—*conveyance from husband and wife presumed an advancement.* Where the husband causes property to be conveyed to his wife the presumption is that it was intended as a gift or advancement, and the burden is upon the husband to show the contrary.

3. **SAME**—*when it is proper to require parties claiming under deed to prove fairness of transaction.* Where a voluntary conveyance was made but a few days before the grantor's death, at a time when she was very weak, both physically and mentally, and when, by reason of the confidential relation between herself and her husband, she could easily have been prevailed upon to make the deed, it is not a harsh rule to require parties claiming under such deed to show that the transaction was a fair one and entered into by the grantor understandingly.

4. **EVIDENCE**—*what sufficient to overcome a notary's certificate of acknowledgment.* A notary's certificate to a voluntary conveyance made by a married woman a few days before her death is overcome by the uncontradicted testimony of three witnesses, two of whom were disinterested, that one or the other of them was in constant attendance upon the sick woman from a time prior to the alleged acknowledgment up to her death, and that during such time neither the notary before whom the deed purported to be acknowledged, nor any other person, presented any paper to the sick woman for signature or acknowledgment.

APPEAL from the Circuit Court of Cook county; the Hon. HARRY HIGBEE, Judge, presiding.

This is a bill in chancery filed on May 26, 1892, in the circuit court of Cook county, by Mary T. McGrath, Nellie McGrath Hallinan, John T. McGrath, Katie McGrath Hynes, Thomas E. McGrath and Anastasia McGrath, as heirs-at-law of Mary McGrath, deceased, against John

Waddington, Jr., and James J. McGrath, their father, to cancel two deeds purporting to convey the title to lots 24, 25 and 26, in block No. 5, in David S. Lee's addition to Chicago, Cook county, Illinois,—one of said deeds bearing date November 13, 1880, and purporting to have been made and executed by said Mary McGrath and James J. McGrath, her husband, to one John Waddington, Jr., and which was filed for record in the recorder's office of Cook county on the second day of April, 1881; the other of said deeds bearing date March 29, 1881, and purporting to have been made and executed by said John Waddington, Jr., and Mattie E. Waddington, his wife, to James J. McGrath, which was filed for record in the recorder's office of Cook county on the second day of April, 1881. John Waddington, Jr., having failed to answer said bill, was defaulted. On the third day of January, 1898, James J. McGrath and Mary McGrath, his wife by a subsequent marriage, conveyed said premises to Oscar A. Lewis by deed, which was filed for record in the recorder's office of Cook county February 14, 1898. On the 24th day of November, 1899, said James J. McGrath died, and subsequently thereto said Mary McGrath, Mary McGrath as administratrix of James J. McGrath, deceased, and Oscar A. Lewis, were made parties defendant to said bill of complaint, and adopted as their answers to said bill the answer of James J. McGrath theretofore filed thereto. A replication having been filed to said answer, the cause was referred to a master in chancery to take proofs and report his conclusions as to the law and the facts. The master, after having overruled the objections of Oscar A. Lewis to his report, found in favor of the complainants, which report was approved and confirmed by the court after overruling said objections, which had been renewed as exceptions to said report, and a decree was entered granting the relief prayed for and canceling said deeds as clouds upon the title of complainants, and finding that Oscar A. Lewis had been in possession of said

premises since the third day of January, 1898, without right, and that he should account to the complainants for such use and occupation, the rights of complainants to such accounting being reserved for a further reference to the master, from which decree Oscar A. Lewis has prosecuted this appeal.

The master in chancery found the facts substantially as follows: On May 1, 1872, Mary Lee Stewart conveyed by deed to James J. McGrath said lots, which deed was filed for record in the recorder's office of Cook county on June 6, 1872. On January 6, 1876, said James J. McGrath and Mary McGrath, his wife, conveyed by deed to John F. Browne said lots, which deed was filed for record in the recorder's office of Cook county on April 7, 1876. On March 16, 1876, said John F. Browne conveyed by deed to Mary McGrath, the wife of James J. McGrath, said lots, which deed was filed for record in the recorder's office of Cook county on April 7, 1876. Said premises, prior to and at the time of the execution of said two last mentioned deeds, were occupied by the said James J. McGrath and Mary McGrath, and their children, as a homestead, and they continued so to occupy the same until the death of said Mary McGrath, which occurred on November 25, 1880. After the death of said Mary McGrath, for a number of years the said James J. McGrath and his children, the complainants, continued to occupy said premises as a homestead, after which the said James J. McGrath continued to make said premises his home until his death. Some time after the death of said Mary McGrath said James J. McGrath married one Belinda Kerwin, by whom he had a number of children. Thereafter the said Belinda Kerwin departed this life and the said James J. McGrath married Mary Lonergan, who survives him, and who on December 4, 1899, was appointed by the county court of Cook county administratrix of the estate of James J. McGrath, deceased, and duly qualified as such.

About the time when said premises were conveyed by the said James J. McGrath and wife to said Browne, and by said Browne to said Mary McGrath, the said James J. McGrath was in the distillery business, and was obliged to give a bond of \$60,000 to the government, and the said Browne was one of the sureties on that bond. Being unable to qualify as such surety, said McGrath and wife conveyed said premises to Browne for the purpose of enabling him to qualify on the bond, and the deed of conveyance was received by Browne for that purpose. No consideration was paid for the conveyance by Browne, and it was made to Browne with the understanding that he would convey said premises, upon request, to Mary McGrath, wife of said James J. McGrath. About the time said bond was given and accepted there was trouble between McGrath and the government on the charge of defrauding the government out of the revenue on certain whiskies sold by him, when James J. McGrath suggested to Browne that said premises be conveyed to Mary McGrath, so they would be secure against any claim of the government, should suit be brought upon said bond. Thereupon, and in response to said suggestion, the said Browne executed and delivered said deed to said Mary McGrath. On August 30, 1878, said James J. McGrath filed his petition in bankruptcy in the United States District Court for the Northern District of Illinois. In said bankruptcy proceeding and with said petition James J. McGrath filed a schedule of all his debts and an inventory of all his property and assets, but in said inventory he did not inventory or mention the real estate in question.

About six weeks prior to her death the said Mary McGrath, who was suffering from a tumor, submitted to a surgical operation, she and her family being advised by their family physician that that was her only chance to recover. For a few days after the operation she appeared to be slightly better but soon became worse, and from the time of said operation until her death never

left her bed. During all the time intervening between said surgical operation and her death Mary McGrath was unable to rise from her bed, had little or no use of her hands, and for about two weeks prior to her death could retain no solid food and was unconscious a considerable portion of said time.

On March 1, 1881, James J. McGrath, in an affidavit made and filed in said bankruptcy proceedings, swore "that he has not willfully sworn falsely in his affidavit annexed to his petition, schedule or inventory filed in this case; * * * that he has not concealed any part of his estate or effects."

The answer of the defendant James J. McGrath, which was adopted by the defendants Mary McGrath and Oscar A. Lewis, in reference to the deed purporting to have been made and executed by the said Mary McGrath, deceased, and the said James J. McGrath, to said John Waddington, Jr., alleges as follows, viz.: "The said Mary McGrath and this defendant united in a quit-claim deed conveying the said premises to John Waddington, Jr., the said quit-claim deed being then delivered by said Mary McGrath to this defendant for the uses and purposes last herein mentioned, and being retained in the possession of this defendant until the same was filed by this defendant for record, along with a warranty deed executed by the said John Waddington, Jr., and Mattie E. Waddington, his wife, and dated on the 29th day of March, 1881, in and by which said deed the said John Waddington, Jr., and his said wife, in carrying out and executing the trust in behalf of this defendant, as hereinbefore set forth, conveyed the said premises to this defendant, and both of said deeds last mentioned were by this defendant on the second day of April, 1881, filed in the office of the recorder of said county for record, and were duly recorded; * * * that it is not true, and he therefore denies, that the said instrument, purporting to be the deed of said Mary McGrath is not, nor was, the

deed of said Mary McGrath, and that she never made, executed nor delivered the same, and that the name of the said Mary McGrath affixed thereto is not the signature of said Mary McGrath, or that the said name was affixed thereto without her knowledge or consent, as alleged and set forth in said bill of complaint, and this defendant denies that there is any truth whatever in the said allegation."

PEASE & POLKY, (H. T. HELM, of counsel,) for appellant.

WILLIS SMITH, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

It is first contended that the evidence is not sufficient to sustain the decree entered in this case. Upon a careful examination of this record we are of the opinion the findings of fact as made by the master and approved by the chancellor were fully justified by the evidence.

It is further contended that Mary McGrath held the title to said premises in trust for James J. McGrath, and that the deeds to Waddington and McGrath were made for the purpose of carrying out and executing such trust. We do not agree with such contention. The evidence shows that the title to these lots was in James J. McGrath; that he conveyed the same to John F. Browne; that John F. Browne, at his instance and request, conveyed the same to his wife, Mary McGrath. Browne testifies that such conveyance was made to Mary McGrath absolutely, and in order that she and her children might own this property and be able to hold the same against the creditors of James J. McGrath. While this conveyance may have been fraudulent as to the creditors of James J. McGrath, it was a binding and valid conveyance as against him and all persons claiming through or under him. Where the husband causes property to be conveyed

to his wife, the presumption is that the same was given to her as an advancement, and the burden of proof is upon him to establish the contrary. There is no such proof in this record. On the other hand, in the affidavit filed in the bankruptcy proceeding by James J. McGrath he stated he had no interest therein. In *Dorman v. Dorman*, 187 Ill. 154, we say (p. 158): "A resulting trust arises, by implication of law, from the acts of the parties. (*Donlin v. Bradley*, 119 Ill. 412; *VanBuskirk v. VanBuskirk*, 148 id. 9; 1 Perry on Trusts, sec. 134.) When the evidence shows the payment of the purchase money by one and the conveyance of the title thereby purchased to another, between parties who are strangers to each other, the law so construes these two facts as to make them constitute a resulting trust. (*Smith v. Smith*, 85 Ill. 189; *VanBuskirk v. VanBuskirk*, *supra*.) If the legal title is taken in the name of the wife such implication does not arise, it being the presumption that the same was intended as an advancement. (*Smith v. Smith*, 144 Ill. 299.) Such presumption may, however, be rebutted by parol testimony, if the same is clear and satisfactory. * * * The rule thus announced has been fully recognized by this court in numerous cases.—*Taylor v. Taylor*, 4 Gilm. 303; *Adlard v. Adlard*, 65 Ill. 212; *Wormley v. Wormley*, 98 id. 544; *Johnston v. Johnston*, 138 id. 385; *Smith v. Smith*, 144 id. 299; *Goelz v. Goelz*, 157 id. 33; *VanBuskirk v. VanBuskirk*, 148 id. 9; *Pool v. Phillips*, 167 id. 432." Our conclusion therefore is that Mary McGrath was the absolute owner of said property at the time of her death, unless she had transferred the same by a valid conveyance prior thereto.

It is next contended that the court erred in holding that the burden of proof was upon James J. McGrath, or the parties claiming title through him, to establish that the obtaining of the deed for said lots from said Mary McGrath was a fair transaction and free from any undue influence. We have already held that the lots were the property of Mary McGrath and that she did not hold

them in trust for her husband. It is admitted that the deed purporting to have been made by said Mary McGrath was without consideration. It was made thirteen days before her death and at a time when she was in a very weak condition, both mentally and physically, and when, by reason of the confidential relation which existed between her and her husband, she could have been readily prevailed upon by him to make such deed. We do not think, therefore, where a deed is obtained under such circumstances, the rule a harsh one which requires a person claiming title thereunder to be required to show that the transaction was a fair one and entered into by the grantor understandingly. (*Sands v. Sands*, 112 Ill. 225; *White v. Ross*, 160 id. 56; *Ross v. Payson*, id. 349; *Dorsey v. Wolcott*, 173 id. 539.) In *Sands v. Sands*, *supra*, we say (p. 232): "The rule is, where a person enfeebled in mind, by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee."

We have considered this case thus far upon the theory that Mary McGrath actually signed said deed, but that the evidence failed to show she had sufficient mental capacity to execute the same or that the same was fairly obtained from her. Under the evidence in this record we are satisfied such deed was never signed and acknowledged by Mary McGrath. During the time that intervened between such surgical operation and the death of Mary McGrath, and at the time it is claimed said deed was executed, the complainant Mary T. McGrath, together with her cousin, Mary Kelley, and a Mrs. Coleman, attended upon said Mary McGrath, with some assistance occasionally from some of the neighbors, but either the said Mary T. McGrath, the said Mary Kelley or Mrs. Coleman was in the room with said Mary McGrath all

the time, as they all testified positively, and that neither C. C. Gilmore, the said notary public before whom said deed purported to be acknowledged, or anyone else, ever presented to Mary McGrath any deed or other paper for her signature or acknowledgment during that period, and that no such person as Gilmore ever entered her room during that time. This testimony is not contradicted, and two of the witnesses are disinterested parties. John F. McGrath testifies he had a conversation with his brother, James J. McGrath, in the winter after the death of Mary McGrath, in which he asked him if he would have to go into court about his wife's property; that James said, "It is a slow way and I will get out of it if I can;" that he had another conversation with him in the following spring, when he asked him what he ever did about the property. He said: "I fixed the whole thing up. It is all on record. There is nobody to ever question it, only the children, and it belongs to them anyway. They will never bother. We will get out of great costs." We think this evidence sufficient to overcome the notary's certificate. *Kerr v. Russell*, 69 Ill. 666; *Lowell v. Wren*, 80. id. 238; *McDowell v. Stewart*, 83 id. 538; *Griffin v. Griffin*, 125 id. 430.

We do not agree with the contention of the appellant that the plaintiffs have been guilty of such *laches* in either the commencement or prosecution of this suit as to bar them from relief in this case. The evidence shows that the complainant Mary T. McGrath was about eighteen years of age at the time of her mother's death. She and the other complainants, who were minors, continued to live with James J. McGrath upon the premises for many years. Their relations at that time were friendly and confidential. They did not discover the fact that James J. McGrath claimed to own this property until many years thereafter and at about the time the youngest of the children became of age. Upon making such discovery they immediately filed their bill to set aside and cancel said deeds. While there has been some delay in the

prosecution of the suit it has never been abandoned, but, so far as we are able to discover from this record, from its inception up to the time a decree was entered in the court below was carried on in the utmost good faith.

The appellant, Oscar A. Lewis, took whatever title he has *pendente lite*, and acquired no better title to said lots than was had by James J. McGrath, his grantor. The only evidence introduced by him was a deed for said lots executed by James J. McGrath and wife January 3, 1898.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE GERMAN ALLIANCE INSURANCE COMPANY *et al.*

v.

JAMES R. B. VANCLEAVE *et al.*

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. ACTIONS AND DEFENSES—*when rule that State cannot be made defendant to suit does not apply.* The fact that money collected by the insurance superintendent as taxes eventually becomes the property of the State does not preclude a suit against him to compel him to refund such taxes, which were paid under protest, and to enjoin him from paying the same to the State Treasurer and the latter from receiving them.

2. EQUITY—*equity may take jurisdiction to avoid a multiplicity of suits.* Equity has jurisdiction of a suit to compel the insurance superintendent to refund taxes claimed to have been collected without authority of law, even though each of the complainants has an adequate remedy at law, where the complainants are numerous, their rights depend upon the same facts, and complete relief may be had by a decree determining a single question applicable to all.

3. INSURANCE—*tax on gross amount of premiums received does not apply to returned premiums.* The two per cent tax imposed by the act of 1899 (Laws of 1899, p. 265,) upon the "gross amount of premiums received" for business done in this State by foreign insurance companies other than life, does not apply to unearned premiums actually refunded upon canceled policies.

APPEAL from the Circuit Court of Sangamon county;
the Hon. JAMES A. CREIGHTON, Judge, presiding.

191	410
e200	214
191	410
106a	57
191	410
e208	1887
191	410
e112a	627
191	410
214	284

PADDOCK & BILLINGS, and BATES & HARDING, for appellants.

E. S. SMITH, (PERRY A. HULL, of counsel,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellants, forty-two corporations organized under the laws of other States and countries, doing fire insurance business in this State, filed their bill in this case in the circuit court of Sangamon county against appellees, the insurance superintendent and treasurer of this State, to compel said insurance superintendent to refund a tax of two per cent paid by complainants, under protest, upon unearned and returned premiums for the year 1900, and to enjoin him from paying over to the State Treasurer the tax so collected and from collecting the same in the future, and to enjoin the State Treasurer from receiving said tax. A temporary injunction was granted, which was dissolved upon a motion, treated as a demurrer, for want of equity upon the face of the bill. Complainants elected to abide by their bill, and the court dismissed it at their costs.

The matter in controversy is the proper construction of the act approved April 19, 1899, entitled "An act providing for a tax on gross premium receipts of insurance companies and associations other than life." (Hurd's Stat. 1899, p. 1042.) That act provides that every insurance company of the class to which complainants belong "shall at the time of making the annual statements as required by law, pay to the insurance superintendent as taxes, two per cent of the gross amount of premiums received by it for business done in this State, including all insurance upon property situated in this State, during the preceding calendar year," and payment of said taxes is made a condition precedent to doing business in this

State. There is a proviso for a deduction of so much of the tax as shall be paid to cities and villages having an organized fire department, but the proviso neither increases nor diminishes the tax and does not affect the question involved: The annual statement referred to is a statement required by law of the condition of the company on the last day of the preceding calendar year, showing its capital stock, assets and liabilities, as well as income and expenditures of the preceding year.

The facts alleged in the bill and admitted for the purpose of the motion are as follows: The complainants severally made their annual statements for the year 1899 to the insurance superintendent on or about February 1, 1900, and stated therein the gross amount of premiums received for business done in this State during the year 1899, according to their understanding of the law. In stating such amount they omitted the premiums returned by them to parties insured, upon cancellation of insurance policies, in compliance with the terms of such policies. They paid over to the insurance superintendent as taxes two per cent of the amounts so reported and received their annual certificates of authority to transact business in this State. Each policy of insurance which was canceled and the unearned premium returned, provided, when issued, that it might be canceled at any time, at the request of the insured or the option of the insurer, on five days' notice, and the policy should become void and the risk ended on the day of cancellation and the unearned premium be returned. This was the usual course of business of all fire insurance companies in the State. The amount returned was fixed by the policy and was based upon the amount of premium earned up to the time of cancellation. The money returned was the unearned premium for the period after the policy was canceled and ceased to be in force. The insurance superintendent made demands on complainants to pay a tax of two per cent of said unearned premiums which had been

returned upon the cancellation of policies, and threatened to enforce the penalties provided by the statute and to revoke the authority of the companies to do business in the State unless his demands were complied with. The complainants then paid, under protest, the several amounts so demanded, which are severally stated in the bill, and amount in the aggregate to \$15,984.87.

Under the constitution the State can never be made a defendant in any court of law or equity, and it is argued in support of the decree that the bill cannot be maintained because the insurance superintendent is an officer of the State, and therefore the suit is against the State. It is not denied that the State may specify any terms or conditions it pleases on which corporations of other States and foreign countries shall be permitted to transact business in this State. The legislature have fixed one of the conditions in this statute, and the only question involved in the suit is, what is the proper construction of the act? The State is not a defendant by name, and the suit does not relate to property owned by the State or which has ever reached its treasury. There is no attempt to recover money from the State, and the question involved is whether the State has authorized, by law, the insurance superintendent to exact the tax. A suit against him is not different, in any respect, from a suit against any other collector of taxes, and a party is not precluded from questioning the unauthorized act of a tax collector or other officer merely because the money collected will eventually reach the State.

It is next insisted that the decree is right because each of the complainants has an adequate remedy at law, by a suit against the insurance superintendent to recover the amount wrongfully collected from it. At least forty-two suits would be necessary to accomplish the purpose and to give to each complainant its legal remedy, and the question involved in each case would be exactly the same. While the demand is separate in each case, the

rights of the parties depend upon the same facts. Complete relief may be furnished by a decree determining the single question applicable to all and in which all are interested. The case is a proper one for an application of equitable powers.

In the construction of the act effect is to be given to the intention of the legislature, and that intention appears to be to levy a tax on the gross income of foreign fire insurance companies. The object is to require such companies to pay, at designated times, a tax of two per cent on the gross receipts of their business for the previous calendar year. There is no dispute as to the meaning of the word "gross," and it is conceded that it means the whole or entire amount of premiums received for business done in this State during the year. The word "gross" is opposed to "net," and its ordinary meaning is the entire amount of the receipts of a business, while the net receipts are those remaining after deductions for the expenses and charges of conducting the business. It is claimed on one side that the legislature meant by the gross amount of premiums the entire premiums received for furnishing insurance indemnity during the year, while on the other side it is insisted that they meant to include all the money which comes to an insurance company, although paid under an agreement for refunding upon the cancellation of the policy, and although the policy is canceled and the insurance ceases and the money is refunded. If it is true that a part of a premium unearned and returned to the insured is premium for business done, it is equally true that if a whole premium were returned and there was in fact no insurance the money would be premium for business done. According to the argument which would include premiums returned on canceled policies, if an insurance company should issue a policy and receive a premium and at once cancel the policy and return the premium it would have done the amount of business represented by the policy and the amount received

would be a premium for insurance business done. We do not think the language used will bear that construction. The merchant would not think of including in the gross receipts of his business any sales of goods with the privilege of return on the part of the purchaser, where they are in fact returned. In such a case there is in the end no sale and no business done, in any proper sense. So in the case of an insurance policy for a definite period with an agreement that it may run any portion of that period and then cease; if the policy is canceled and the insurance ceases there is no insurance business for the remaining portion of the period. The premiums returned are not paid as a liability of the insurance company or as a charge or expense of conducting the business, but because one party or the other avails of the option and terminates the insurance. An insurance company would not be authorized to omit from its statement any part of premiums received merely on the ground that policies might be canceled in the future; but where they have been in fact canceled and the money returned, the entire or gross premium receipts cannot, by any fair interpretation, include the moneys so returned. The two per cent collected by the insurance superintendent and paid under protest is upon moneys which did not inure to the benefit of the insurance companies in any manner, and which are not premiums for furnishing fire insurance or indemnity to holders of policies. The apparent purpose of the act is to levy a tax on gross income, and not upon money which is in no sense revenue to the insurance companies.

We think the circuit court was wrong in sustaining the motion and dismissing the bill, and the decree is reversed and the cause remanded.

Reversed and remanded.

ALTA I. DEEN

v.

CHARLES BLOOMER.

Opinion filed June 19, 1901—Rehearing denied October 10, 1901.

1. ALIMONY—*contempt proceeding for failure to pay alimony—burden of proof.* One attached for contempt of court in failing to pay alimony has the burden of proving that, acting in good faith and with an honest purpose, he was unable to comply with the decree.

2. SAME—*alimony is not a debt which may be discharged in bankruptcy.* Unpaid alimony is not such a debt owing from husband to wife as may be discharged by an order in bankruptcy, whether the alimony accrues before or after the bankruptcy proceeding, since the duty of a husband and father to support his wife and children is a social obligation as well as a pecuniary liability, and is not a debt contemplated by the Bankruptcy act.

Bloomer v. Deen, 93 Ill. App. 479, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Mercer county; the Hon. W. H. GEST, Judge, presiding.

MCARTHUR & COOKE, and JAMES M. BROCK, for appellant:

The burden is on a husband who fails to comply with an order directing payment of alimony, to satisfy the court that his failure to pay is due solely to his inability to do so. *Hurd v. Hurd*, 63 Minn. 443.

If one decreed to pay alimony fails to pay in so far as he is able, he may be committed. *Schuele v. Schuele*, 57 Ill. App. 193; *O'Callaghan v. O'Callaghan*, 69 Ill. 554.

Where one spends large sums of money resisting payment of alimony rather than to apply same in discharge of his liability, he will not be held to be unable to pay anything on the decree. *Barclay v. Barclay*, 184 Ill. 471.

Alimony is not such a debt as will be released by a discharge in bankruptcy. *In re Anderson*, 97 Fed. Rep.

321; *In re Shephard*, 97 id. 187; *In re Baker*, 96 id. 954; *Kerr v. Kerr*, 2 Q. B. 439.

Alimony is only held to be a provable debt in bankruptcy when the laws of the State where the allowance of alimony is made regard it as a fixed liability. *In re Nowell*, 99 Fed. Rep. 931.

In this State alimony is not regarded as such a debt as may be discharged in bankruptcy, whether the alimony accrues before or after the bankruptcy proceedings. *Barclay v. Barclay*, 184 Ill. 375.

WILLIAM J. GRAHAM, and ROBERT J. GRIER, for appellee:

In so far as this proceeding seeks to punish appellee for contumacious conduct or direct contempt of the decree of the court the proceeding is a criminal contempt in effect, and as to that feature of the case he has a right to purge himself by his own affidavit, and the court should consider no counter-showing. *Crook v. People*, 16 Ill. 534; *Buck v. Buck*, 60 id. 105; *Dinsmoor v. Bressler*, 164 id. 211; *Welch v. People*, 30 Ill. App. 339.

Attachment for non-payment of alimony is a civil execution, (*Buck v. Buck*, 60 Ill. 105,) and such a proceeding is merely coercive. *Phillips v. Welch*, 11 Nev. 187; *Ormsby v. Ormsby*, 1 Phila. 578.

Proceedings in attachment for contempt must be carried on *stricti juris*. *Murphy v. Abbott*, 13 Ill. App. 68.

When there is no evidence in the record of defendant's ability to pay alimony, a decree founded thereon, allowing alimony, will be reversed. *Becker v. Becker*, 15 Ill. App. 247.

When one, through pecuniary inability, misfortune or disaster, is unable to pay alimony decreed against him, he cannot be held to be in contempt. *Wightman v. Wightman*, 45 Ill. 167; *Schuele v. Schuele*, 57 Ill. App. 189; *Blake v. People*, 80 Ill. 11; *Kadlowsky v. Kadlowsky*, 63 Ill. App. 292; *O'Callaghan v. O'Callaghan*, 69 Ill. 552.

Past due alimony in case of divorce *a vinculo matrimonii* is a fixed and settled liability—a debt. *Dinet v. Eigenmann*, 80 Ill. 274; *Craig v. Craig*, 163 id. 176; *In re Challenor*, 98 Fed. Rep. 82; *In re Howell*, 99 id. 931.

Past due alimony in case of divorce *a vinculo* is a provable debt under the bankruptcy law of 1898. *In re Houston*, 94 Fed. Rep. 119; *In re Van Orden*, 96 id. 86.

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in the circuit court of Mercer county against Charles Bloomer for contempt of court in not obeying its decree ordering him to pay to appellant, as his divorced wife, a sum of money due as alimony. The wife obtained a decree of divorce from her husband in 1893 because of his fault, the charge being extreme and repeated cruelty. The court gave to the wife the custody of their three children, and provided that the husband pay to her \$40 per month thereafter and the costs of the proceeding. Before the hearing in the divorce proceeding the husband disposed of his real and personal property, and immediately after the rendition of the decree left the State and did not return until about January 1, 1900. During his absence he wholly failed to make any of the payments of alimony ordered. In 1899 the wife married again. On March 3, after Bloomer's return, the wife, by way of petition, brought to the attention of the court the fact that the husband had failed to comply with its order, and thereupon a writ of attachment was issued and he was taken into custody. His counsel moved the court that he be discharged, and in support of the motion urged two grounds: First, that the defendant was not then, and had not been, "able to pay any part of the decree for alimony" entered against him; and second, that on September 11, 1899, he was discharged in bankruptcy by the United States District Court for the District of Colorado from liability upon said decree. In

support of the motion the defendant submitted affidavits of himself and others touching his ability to pay the alimony, and affidavits were also submitted on behalf of the petitioner. The court found that defendant was in contempt, for the reason that, "being financially able, in whole or in part," he had willfully neglected to pay said alimony or any part thereof, and that there was due the sum of \$3284.17, which he was ordered to pay forthwith, or on default thereof to be committed to the county jail, to be there confined until he made such payment or was otherwise discharged by due process of law. From that order he appealed to the Appellate Court for the Second District, where the order of the circuit court was reversed, the holding of the Appellate Court being, that the defendant had been unable to pay the alimony decreed, and that the proof failed to show that his inability to do so resulted from any desire on his part to produce that condition. The appellant now prosecutes this appeal, seeking to reverse the judgment of the Appellate Court and to have the order of the circuit court affirmed.

The contention of appellant is that the facts amply justified the order of the circuit court, and that the Appellate Court committed error in reversing it. The affidavit of appellee himself stated, in substance, that at the time of the rendition of the decree his real estate was deeded to his mother, who assumed the indebtedness upon it, which amounted to the value of the land; that he then had a sale of his personal property and realized therefrom \$1306.50, which he paid upon his debts "as far as it would go," leaving many debts unpaid; that he then went west "to find employment and accumulate money to pay debts and alimony;" that he first took a course of book-keeping in a Kansas college; that then, being unable to find employment as book-keeper, he engaged in various employments, working in a foundry, in a commission house, in a notion store, on a farm, as a cook on a ranch, and again as a farm hand, then as tenant of 120

acres of land which he farmed on his own account, then herding horses on a ranch, then working in a soap factory, in a clothing house, for a detective agency, at teaming, as street car conductor, in a commission house and in a railroad office. While farming for himself he states he made no money but lost some. While so engaged he injured his back, resulting in the necessity of a surgical operation. In enumerating his various employments he says his expenses were always equal to his income, and sometimes more, he frequently sending to his father for aid. In itemizing his expenses he says he used his money to pay "back debts" and "current expenses." He seems at all times to have overlooked entirely his duty to his children and divorced wife under the decree of the court. He also says that his health is such that he cannot work at hard physical labor because of an injured ankle and because of the injury to his back; that he has endeavored since the rendition of the decree to comply therewith and make payment. He also sets up the fact of his discharge in bankruptcy September 11, 1899. When he went away he says he relied upon his father to look after the children, and states that he paid for clothing at one time, for one of them, the sum of \$25. His father, James Bloomer, files an affidavit corroborating him in essential respects. He says he frequently gave the wife money to purchase clothing for herself and the children. The affidavit of a physician, Dr. Allen, was introduced, which states that in 1886 the appellee was treated for a sprained ankle; that in his opinion the effect of the sprain is such that he cannot, without serious inconvenience to himself, engage in manual labor which would occasion his standing upon his feet any extended period of time.

Counsel for appellant then offered counter-affidavits, the first one being that of the appellant herself. She states that after the filing of her bill for divorce, and before the rendition of the decree, appellee sold all his real and personal property, but nothing was paid on the

decree; that within three days after the decree he went away, and has remained beyond the jurisdiction of the court until January 1, 1900; that after his departure she supported herself and the children, working at dress-making, receiving nothing from the defendant; that her health was impaired by reason of her work; that two of the children are with her brothers, being well cared for; that owing to her ill-health she had to call upon her brothers to aid her; that her husband expended only the sum of \$3.25 for clothing for the one child mentioned in his affidavit; that while the appellee and affiant lived together he was stout and rugged and was never sick a single day; that he would occasionally complain of his ankle when he plowed all day, but it did not interfere with his ability to do physical labor; that after the bill was filed in the divorce case, and before the hearing, he told her she should not have a cent of money or property from him. Attached to her affidavit as exhibits are a number of letters from appellee. One, purporting to have been written at New Orleans, October 5, 1895, states he was then holding a good paying position. The next, written in November following, states that he is making money and has some for a sick day, and so far he had been in good health. The remaining letters were written at Letts, Iowa, one of which states that if the wife would bring the children to see him he would buy what they need. Further affidavits were introduced by appellant tending to show that appellee had stated to other persons, before his departure and after his return, that he never intended to pay any of the alimony; that he had had money while away, but had "blown it." A second affidavit of the physician, Dr. Allen, was presented by appellant, stating that he had not examined appellee since his return. In rebuttal, appellee presented another affidavit of his own, stating that he had not been in the State of Louisiana, but that the letters purporting to have been sent from there were carried there for mailing.

The evidence, record and proceedings in the divorce case were then offered in evidence.

We think the circuit court was justified in its finding appellee guilty of willfully disregarding the order of the court as to the payment of alimony. It appears that after the divorce was granted appellant was compelled to support herself and the three children by her own efforts, sewing and doing other work,—at times even impairing her health by so doing,—and appellee contributed nothing to aid her. From his own evidence it clearly appears that he could have paid something, at least, upon the amount due. He states in one of his letters to petitioner that he was then holding a good paying job and had money laid up for a sick day. Was he falsifying then or was he stating the truth at a later time,—namely, when he made his affidavit saying, in effect, that he had been at no time able to pay any part of the alimony? He contradicts himself without any explanation, and upon the face of the evidence it would seem his statements were entitled to very little credit. Taken alone they do not give the court light upon the question at issue. The appellant not having seen him since his departure, was, of course, unable to produce testimony as to his ability to pay the alimony during his absence. His attempt to show a physical disability is hardly entitled to credit. His various occupations, many of them requiring a vigorous physical condition, refute his claim in that regard. It will be noticed in one of his letters he offers to comply in part with the order of the court if the petitioner will bring the children to see him, and in this affidavit he says he has at all times been willing to take the children and care for them but the wife would not consent. All this indicates a willful disregard for the order of the court. It may be conceded that he was not at all times able to pay the whole of the monthly allowance, but his affidavit and his letters fail to show that he made an honest effort to pay it, while, on the other hand, they and

the other evidence adduced tend to indicate a willful neglect to pay not only the whole, but even a small part of it.

Counsel attempt to say that the allowance of alimony was too large. It does not appear that this was the reason he failed to comply with the mandate of the court. He did not question the propriety of the allowance, but pursued a course which indicated that he acquiesced in the justice of the order. Furthermore, if he had indicated a desire to pay any part of it, and the amount had appeared to the court to be unjust because beyond his means and ability to pay, the order was subject to be modified at any time, and doubtless would have been. He during the seven years made no complaint as to the amount of allowance, but only when attached for contempt does he attempt to resort to that excuse for his failure to comply with the order of the court. The burden of proof was upon him to show that, acting in good faith and with an honest purpose to comply with the order of the court, he was unable to do so,—and this, we think, the circuit court was justified in finding he failed to do. By his own affidavit he does not state in terms that he was at all times unable to comply with the order, but simply states facts from which his counsel contend that the inference must be drawn that he had no such ability.

It is also urged that the proceeding in bankruptcy discharged the appellee from the payment of this alimony. That question was before this court in the case of *Barclay v. Barclay*, 184 Ill. 375, in a contempt proceeding very much like this, and it was there held that alimony cannot be regarded as a debt owing from the husband to the wife which may be discharged by an order in bankruptcy, whether the alimony accrues before or after the bankruptcy proceeding. In addition to what was there said we might add, the duty which the law imposes upon a husband and father to support and maintain his wife and children is not such a debt as contemplated by the

Bankruptcy act. It is a social obligation as well as a pecuniary liability. It is founded upon public policy and is for the good of society.

For the reasons indicated, the judgment of the Appellate Court will be reversed and the order of the circuit court affirmed.

Judgment reversed.

DAVID ROBINSON *et al.*

v.

MARTHA J. RUPRECHT *et al.*

Opinion filed June 19, 1901—Rehearing denied October 23, 1901.

191	424
196	*444

191	424
199	*451
199	*453

191	424
208	*599
206	*298
e206	*294
206	*295
108a	*138
108a	*139

1. COURTS—*when State court properly declines to delay cause until termination of suit in Federal court.* A State court properly declines to delay a suit until the termination of a prior suit in the United States court involving the same question, where the suit in the State court is for the partition of real estate whereas the suit in the Federal court relates to the personal property only, and where the parties to the suits are not identical, and the determination of either suit does not involve any conflict of authority between the respective courts.

2. ILLEGITIMATES—*when presumption that husband is the father of wife's children does not prevail.* The presumption that the legal husband of a woman is the father of her children cannot prevail where it appears from the evidence that in the course of nature he could not have been the father of them.

3. SAME—*statute respecting illegitimates applies to all illegitimate children.* The provisions of sections 2 and 3 of the Statute of Descent, relating to illegitimates, apply to all illegitimate children, even those born of parents who at the time of the conception and birth of such children were living in a state of adultery, in violation of their marriage vows and the laws of the State.

4. MARRIAGE—*an originally meretricious relation may be shown to have become matrimonial.* While the presumption is that a cohabitation which was meretricious in its inception continues to be so, yet it may be shown by proof, either direct or circumstantial, that the cohabitation has lost its wrongful character and become matrimonial in intent.

5. SAME—*when a valid common law marriage is shown.* A common law marriage valid in this State is established where, although at the time of the celebration of the supposed marriage the man

knew that he had a legal wife living and the woman had a husband living whom she in good faith supposed to be dead, the parties continued to cohabit as husband and wife, publicly conducting and announcing themselves as such and acknowledging their offspring as their children after receiving knowledge that the man's legal wife was dead and after the woman's legal husband had died; and in such case the children are rendered legitimate, under the statute.

CARTWRIGHT and HAND, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

S. S. GREGORY, JOHN C. SPOONER, and A. L. SANBORN, for appellants:

Cohabitation originally illicit is presumed to so continue until a change therein is shown. *Cartwright v. McGown*, 121 Ill. 388; *Collins v. Voorhees*, 14 L. R. A. 364; *Cole v. Cole*, 153 Ill. 585; *Badger v. Badger*, 88 N. Y. 546; *Williams v. Williams*, 46 Wis. 464; *Floyd v. Calvert*, 53 Miss. 37; *Insurance Co. v. Riegal*, 113 Pa. St. 294; *Cargile v. Wood*, 63 Mo. 501.

Where persons are born illegitimate, the subsequent marriage of their parents does not legitimate them unless at the time of conception or birth the parents could lawfully intermarry. Rev. Stat. chap. 39, sec. 3; chap. 17, sec. 15; *Marionneaux v. Dupuy*, 48 La. Ann. 496; 1 Blackstone's Com. 455; 2 Domat, sec. 2510; 4 Gibbon's Rome, 482, chap. 44; Dwight on Law of Persons, 257; 2 Kent's Com. 209; 2 Pingrey on Real Prop. sec. 1143; 1 Rapalje & Lawrence's Law Dic. 118; 1 Dembitz on Land Titles, 287; 2 Am. & Eng. Ency. of Law, 895; *Sams v. Sams*, 85 Ky. 396; *Cope v. Cope*, 137 U. S. 682; *People v. Gaulter*, 149 Ill. 39; *Garland v. Harrison*, 8 Leigh, 368; Fraser on Parent and Child, 36; Sutherland on Stat. Const. sec. 246; *Scanlon v. Walsh*, 81 Md. 118; *Dalrymple v. Dalrymple*, 2 Hagg. 54.

Where the proof shows that the children of a married woman are not the children of her husband, there can be no presumption that they are the legitimate children of her paramour, nor any presumption of subsequent legitimation in jurisdictions where this is permitted by law;

hence there is in this case no presumption of legitimacy which contesting appellees can invoke. 1 Blackstone's Com. 457, note 19; 1 Greenleaf on Evidence, sec. 28, note c; 2 Pingrey on Real Prop. sec. 1145; *Regina v. Mansfield*, 1 Q. B. 444.

Where cohabitation, matrimonial in form, is commenced under a marriage void, and known to be void by either party, by reason of an impediment to a valid marriage between them, the removal of the impediment will not change the relation from meretricious to matrimonial cohabitation, but there must be a subsequent interchange of matrimonial consents, or actual marriage, after the removal of the impediment. Such marriage is not shown by continued cohabitation and repute of marriage, accompanied with a general admission and declarations by either or both parties that they are husband and wife. *Cartwright v. McGown*, 121 Ill. 388; *Dalrymple v. Dalrymple*, 2 Hagg. 54; *George v. Thomas*, 10 Up. Can. 604; *Crymble v. Crymble*, 50 Ill. App. 544; 1 Bishop on Mar., Div. and Sep. secs. 961, 970, 985; *Wright v. Wright*, 48 How. Pr. 1; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Brinkley v. Brinkley*, 50 id. 184; *Badger v. Badger*, 88 id. 546; *Foster v. Hawley*, 8 Hun, 68; *Queen v. Millis*, 10 C. & F. 534; *Randlett v. Rice*, 141 Mass. 385; *Beamish v. Beamish*, 9 H. L. C. 274; *Norcross v. Norcross*, 155 Mass. 425; *Peck v. Peck*, 155 id. 479; *Barnum v. Barnum*, 42 Md. 251; *Rose v. Rose*, 67 Mich. 213.

Where the jurisdiction of a court and the right of plaintiff to prosecute therein have once attached, that right cannot be arrested or taken away by proceedings in another court. *Munson v. Harroun*, 34 Ill. 422; *Bank v. Hazard*, 49 Fed. Rep. 293; *Logan v. Lucas*, 59 Ill. 237.

FRANK IVES, and VINCENT D. WYMAN, for appellees:

If the words of a statute are free from ambiguity and doubt, and no intention contrary to that expressed appears in other parts of the statute, there is no occasion for interpretation. A bare reading suffices. Sutherland

on Stat. Const. secs. 234-237, and cases cited; *Gas Co. v. Downey*, 127 Ill. 201; *Martin v. Swift*, 120 id. 488.

"Illegitimate" means begotten and born out of lawful wedlock, and includes all bastards, whether the fruit of fornication, adultery or incest. *Blythe v. Ayers*, 96 Cal. 532; *Brewer v. Blougher*, 14 Pet. 178; *Cope v. Cope*, 137 U. S. 682; 3 Am. & Eng. Ency. of Law, (2d ed.) 895; 2 Kent's Com. 208, 209; 1 Blackstone's Com. 454, 455; *Miller v. Miller*, 18 Hun, 507.

Where a legislature enacts what purports to be a complete act of descents, all former rules of inheritance are abrogated. It will be presumed the legislature intended to provide for every possible case, and neither the common nor civil law can be resorted to to determine the construction to be given the statute. *Ives v. McNicoll*, 53 N. E. Rep. 60; *Brown v. Turberville*, 2 Call. 390; *Templeman v. Steptoe*, 1 Munf. 338; *Davis v. Rowe*, 6 Rand. 355; *Garland v. Harrison*, 8 Leigh, 368.

Unless it is clearly stated that adulterine bastards are excepted from the operation of a legitimation statute it cannot be held such an unjust exception was intended. The legislature has not made the right of a child to inherit depend upon the degree of guilt of his parents. *Ives v. McNicoll*, 53 N. E. Rep. 60; *Hawbecker v. Hawbecker*, 43 Md. 516; *Blythe v. Ayers*, 96 Cal. 531; *Carroll v. Carroll*, 20 Tex. 731.

When a marriage in fact is shown, the law raises a strong presumption of its legality, and the burden is cast upon the objecting party to establish its invalidity, even though that require the proof of a negative. *Jones v. Gilbert*, 135 Ill. 27; *Johnson v. Johnson*, 114 id. 611; *Schmisseeur v. Beatrice*, 147 id. 210; *Cartwright v. McGown*, 121 id. 388; *Coal Co. v. Jones*, 127 id. 379.

The law presumes innocence—not guilt. So that when the second marriage of a person is shown, and it is established the former spouse was then living, the law will presume the first marriage was dissolved by divorce.

This presumption is strengthened by the fact that the parties to the first marriage have both re-married, and by the long lapse of time. And stronger proof to rebut the presumption is required where both parties are dead and the legitimacy of their children is in issue. It is not rebutted by mere proof the first spouse did not obtain a divorce. *Non constat*, the other may have done so. *Johnson v. Johnson*, 114 Ill. 611; *Cartwright v. McGown*, 121 id. 388; *Coal Co. v. Jones*, 127 id. 379; *Jones v. Gilbert*, 135 id. 27; *Schmisser v. Beatrice*, 147 id. 210; *Boulden v. McIntyre*, 119 Ind. 574; *Wile's Estate*, 6 Pa. Sup. Ct. 435; *Harris v. Harris*, 8 Ill. App. 57; *Blanchard v. Lambert*, 43 Iowa, 228; *Hull v. Rawls*, 27 Miss. 471; *Carroll v. Carroll*, 20 Tex. 731; *Leach v. Hall*, 64 N. W. Rep. 790; *In re Edwards*, 58 Iowa, 431.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery filed in the circuit court of Cook county to partition the real estate of which Curtis E. Robinson, Sr., died seized. The appellants, a brother, a sister and four nieces of the said deceased, filed the bill, and therein alleged that said deceased left neither widow, child, children, descendants of child or children, father or mother, him surviving, and that they and the appellee Nathan S. Robinson, a brother of said deceased, (who refused to join in the bill as a complainant and was thereupon made a defendant,) were the only legal heirs of said deceased, and were, under the statutes of descent, the owners, as tenants in common, of the real estate of which he died seized. The bill alleged the appellees (except said Nathan S.) claimed to be the lawful children and only legal heirs of said deceased. The relief asked by the bill was, that the legal title to the real estate of which the said deceased was the owner should be declared to be in the complainants and said Nathan S., as tenants in common, and that a decree in partition be entered allotting it to them in severalty, according to their alleged respective interests therein.

Prior to the institution of the suit for partition the appellants, as complainants, filed in the Circuit Court of the United States for the Northern District of Illinois a bill in chancery against these appellees, (except said Nathan S. Robinson, who was not made a party complainant or defendant to the proceeding in the United States court,) Charles Steinbrecher and Theodore Schintz. Before the case at bar was reached for hearing in the trial court, counsel for appellants moved to stay further proceedings therein until the cause pending in the Circuit Court of the United States could be heard and disposed of in the Federal court. The ground of the motion was that the two cases involved the same question, and that that in the United States court was the prior proceeding. The denial of the motion by the court is complained of as error. The proceeding in the United States court related only to the personal property of the estate of the said Curtis E. Robinson, Sr. The proceeding at bar has relation only to the real estate. The parties in the two actions were not the same. The prosecution to a final termination of either suit did not involve any conflict of authority between the respective courts in which the suits were pending. It was not error in the State court to decline to await the termination of the litigation in the Federal court.

The circuit court of Cook county proceeded to the disposition of the cause pending before it, and after a full hearing entered a decree declaring the said deceased left him surviving the appellees, Martha J. Ruprecht, Bessie L. Howison and Curtis E. Robinson, Jr., his children and only heirs-at-law, and ordered that the bill for partition of the premises filed by the appellants be dismissed. This is an appeal to bring the decree of the circuit court in review in this court.

In 1869 said Curtis E. Robinson, Sr., without pretense of marriage, began living and cohabiting with one Johannah Schoeninger in the city of Chicago as though the

relation of husband and wife existed between them. The appellee Martha Ruprecht (*nee* Robinson) was born June 22, 1870, while this illicit relation continued. On the 24th day of April, 1873, the said Curtis E., Sr., applied to the clerk of the county court of McHenry county, Illinois, for a license authorizing the ceremonies of marriage to be celebrated between himself and said Johannah. A license was issued accordingly, and on the same day the marriage was celebrated between them before a justice of the peace of said McHenry county. They continued to live and cohabit together as husband and wife until the death of said Johannah, which occurred April 14, 1891,—a period of eighteen years. They lived during all these years in the city of Chicago and deported themselves as husband and wife. Curtis E., Sr., survived Johannah but about a year, and died April 20, 1892. The appellees Curtis E., Jr., and Bessie L. Howison, were born to them after the celebration of the marriage. Prior to the celebration of the marriage both parties thereto had been previously married. Mary J., the wife of said Curtis E., Sr., by the prior marriage, whom he had separated from in the State of Massachusetts, was then living and undivorced, as he well knew. Gottlieb Schoeninger, the husband of said Johannah, was then, in fact, living somewhere in the State of Pennsylvania, but it seems to be well established she had been informed, and upon reasonable grounds believed, that he was dead, and in good faith believed she had full right to enter into the marriage relation. On December 27, 1875, Mary J., the legal wife of said Curtis E., Sr., departed this life at her home in the State of Massachusetts, and within a few months thereafter appellee Nathan S. Robinson came from Massachusetts to Chicago and informed said Curtis E., Sr., and said Johannah, that said Mary J. was dead. Gottlieb Schoeninger, husband of said Johannah, survived until the 13th day of May, 1890, at which date he died at Nazareth, Pennsylvania. He had entered into marriage

with another woman in 1870, at Easton, Pennsylvania. The fact said Schoeninger was living at the time of their marriage in McHenry county never reached either said Curtis E., Sr., or said Johannah. Both died resting under the belief which they entertained at the time of the celebration of the marriage between them in McHenry county in 1873, that he had died previous thereto.

The cohabitation of said Curtis E., Sr., and said Johannah, was meretricious in its inception. The celebration of the marriage contract between them in 1873, in McHenry county, did not change their adulterous relation, for the reason the said Curtis E., Sr., had, as he well knew, a legal wife. They, however, continued to live together as husband and wife for nearly sixteen years after the death of said Mary J., the wife of said Curtis E., Sr., and for about a year after the death of Gottlieb, whose death removed the only impediment to their legal marriage. Their children, Martha, Curtis E., Jr., and Bessie, the appellees, were treated and acknowledged by both parents as true and lawfully begotten children during all those years. Sections 2 and 3 of chapter 39 of our statutes, entitled "Descent," (Hurd's Stat. 1899, p. 653,) are as follows:

"Sec. 2. An illegitimate child shall be heir of its mother and any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person, and take, by descent, any estate which the parent would have taken, if living.

"*Second*—The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases.

"*Third*—In case of the death of an illegitimate intestate, leaving no child or descendant of a child, the whole estate, personal and real, shall descend to and absolutely vest in the widow or surviving husband.

"Fourth—When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants—one-half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor.

"Fifth—In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law.

"Sixth—When there are no heirs or kindred, the estate of such person shall escheat to the State, and not otherwise.

"Sec. 3. An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate."

The law raises the presumption that Gottlieb, the legal husband of said Johannah, was the father of her children. The presumption is not, however, conclusive, but is rebuttable. It appeared in the proof that there was no possibility of access to the mother on the part of the said Gottlieb at the time of the conception of either of these appellee children. In the course of nature he could not have been the father of either of them. In such state of case the presumption cannot prevail. (1 Greenleaf on Evidence, sec. 128, note c; 3 Am. & Eng. Ency. of Law,—2d ed.—876, 877.) The said Curtis E., Sr., was properly regarded by the chancellor as the father of the appellees, Martha J. Ruprecht, Curtis E. Robinson, Jr., and Bessie L. Howison.

The contention of the appellants is, that if it be conceded the said Curtis E., Sr., was the father of said appellees, they were at birth illegitimate; that they were begotten and born while their parents were living in a state of adultery, and for that reason said section 3 does

not apply to them. The argument is, that at the common law legitimation of children born out of wedlock was unknown, and that all legislation admitting illegitimate children to the right of succession, being in derogation of the common law, must be strictly construed, and hence that such legislation should not be construed to apply to children born of parents who, at the time of the conception and birth of such children, in violation of their marriage vows and of the Criminal Code of the State, were living in a state of adultery. Counsel cite as in support of their position, 2 Pingrey on Real Prop. 1143, 1 Rapalje & Lawrence's Law Dic. 118, title "Bastardy," and *Sams v. Sams*, 85 Ky. 396. But we think the weight of authority, as well as by far the better reason, is opposed to this view. (*Carroll v. Carroll*, 20 Tex. 731; *Hawbecker v. Hawbecker*, 43 Md. 516; *Blythe v. Ayers*, 96 Cal. 532; Schouler on Domestic Relations, 226; *Ives v. McNicoll*, 53 N. E. Rep. 60; *Sutphin v. Cox*, 1 West. Law Monthly, 346.) The rule of the common law was, that every bastard, whether the fruit of adulterous, incestuous or other manner of intercourse not sanctioned by wedlock, was deemed to be of kin to no one, and therefore not capable of inheriting from any one, nor of having heirs, except of his own blood, who could inherit from him. (*Blacklaws v. Milne*, 82 Ill. 505; *Stoltz v. Doering*, 112 id. 234; 4 Kent's Com.—13th ed.—445; 3 Am. & Eng. Ency. of Law, 892.) The common law of England recognized no mode of legitimating bastards except by a special act of parliament. (4 Kent's Com.—13th ed.—note 4 to p. 445; 3 Am. & Eng. Ency. of Law,—2d ed.—p. 896.) In the absence of statutory enactments the common law rule would be the law in Illinois. (*Stoltz v. Doering*, *supra*.) The rule visited the sins of the parents upon the unoffending offspring, and could not long survive the truer sense of justice and broader sense of charity that came with the advancing enlightenment and civilization of the race.

Sections 2 and 3 of our Statute of Descent were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class. Section 2 of the act relates to the capacity of illegitimates to inherit and to the capacity of others to inherit from them. It abrogates the common law rule that an illegitimate is the child of nobody, and could not take property by inheritance even from its own mother. Section 3 was adopted for the purpose of providing a mode by which the same class of persons referred to in section 2,—illegitimates,—could be legitimated. The same words, "illegitimate child," are used in both sections, and we know of no rule of construction, and certainly there is no reason, requiring a different meaning should be given to the words in one section to that given them in the other. Section 3 enables parents to intermarry when they may legally do so, and acknowledge their offspring born prior to the legal celebration of their union, and we do not see the force of the reasoning that would so restrict the meaning of the section as to exclude from its operation parents, one or the other of whom has violated his or her marriage obligations in the procreation of the child. The child of such parents is not less innocent or unoffending than the child of parents who were unmarried at the time of the copulation, and the ground upon which the insistence is based a distinction should be made,—that the child shall be punished for the sins of the parents,—shocks every sense of justice and right. The degree of moral or criminal delinquency of the parents does not enter into consideration in construing the section. (See *Brewer v. Blougher*, 9 Pet. 178; *Blythe v. Ayers*, 96 Cal. 532.) It was not the legislative intent to exclude from the benefits of said sections 2 and 3 any illegitimate person.

It follows, then, that said appellees, Martha J. Ruprecht, Curtis E. Robinson, Jr., and Bessie L. Howison, were properly regarded by the chancellor as the offspring

of the said Curtis E., Sr., deceased, and that though illegitimate by birth, they were legitimated and became his legal heirs if the legal relation of husband and wife afterwards existed between their parents and the said Curtis E., Sr., acknowledged them as his children. That he did so acknowledge them cannot be the subject of controversy. He was to them a kind and indulgent father, and the record abounds in proof of acts and words of his which placed all question of his acknowledgment of them as his children beyond doubt or debate.

There was no proof marriage vows were celebrated between said Curtis E., Sr., and said Johannah, in accordance with the requirements of the statute with relation to marriages, except the marriage in McHenry county. The McHenry county marriage was illegal, for said Curtis E., Sr., at that time had a living wife and said Johannah a living husband. The connection between them was in its inception meretricious, and the presumption of their innocence and morality was at once rebutted. The presumption is that a cohabitation meretricious in its inception continues meretricious; but that the evil purpose of the parties subsequently changed and that the cohabitation lost its wrongful character and became matrimonial in intent and character may be shown by proof, direct or circumstantial.

It may be here noted as a distinction between this cause and that of *Cartwright v. McGown*, 121 Ill. 388, that in the latter case Lewis married Zerelday Cacey with full knowledge he was then the husband of a living wife, and never thereafter obtained information that this impediment to a lawful union with Zerelday had been removed by the decree of divorce granted to his legal wife in Kentucky, but that his cohabitation with Zerelday remained always meretricious so far as he was concerned, and for that reason it was held the presumption that a legal marriage was celebrated between said Lewis and said Zerelday after the granting of the decree of divorce

did not arise. The formal statutory celebration of marriage between said Curtis E., Sr., and said Johannah, indicated that it was their desire their subsequent connection should be considered and understood to be matrimonial. They in good faith, so far as this record discloses, at the time of the marriage believed that Johannah was a widow and might lawfully marry, but Curtis E., Sr., at least, knew that he then had a living wife and could not lawfully enter into another marriage union. In 1875,—about two years after this formal marriage,—Mary J., the wife of said Curtis E., Sr., died, and within a few months thereafter said Curtis E., Sr., and Johannah, were advised that said Mary J. was no longer living. They then believed there was no impediment to their legal union as husband and wife. There is no direct proof they subsequently entered into a statutory marriage, but their actions, conduct, their cohabitation and repute, were foreign to and inconsistent with any relation other than that of husband and wife, and there can be no doubt but that after the death of said Mary J. the cohabitation between said Curtis E., Sr., and said Johannah, was matrimonial in the intent and belief of both of them. Their actions, life and repute from thenceforth during the remainder of their lives were those of husband and wife. The impediment to that legal relation was removed May 13, 1890, by the death of said Gottlieb, the husband of said Johannah. There is no proof on the question whether they were or were not advised of his death. They believed that he was dead when the ceremony of marriage was performed in McHenry county, in 1873, and so far as the record discloses were never advised to the contrary. Johannah lived nearly a year after the death of Gottlieb and died April 14, 1891, and said Curtis E., Sr., survived Johannah but about one year. It was lawful after the death of Gottlieb for them to enter into the marriage relation. They believed their cohabitation was matrimonial, intended it should be so, and the presump-

tion of marriage from cohabitation apparently matrimonial became applicable to their relation as husband and wife in aid of the legitimacy of their children.

The chancellor found "that the said Curtis E. Robinson, Sr., and Johannah Robinson lawfully intermarried at some time between May 13, 1890, (the date of the death of Gottlieb Schoeninger,) and April 14, 1891; that both before and after such intermarriage, and until his death, the said Curtis E. Robinson, Sr., continuously acknowledged the said Curtis E. Robinson, Jr., Martha J. Ruprecht, (formerly Robinson,) and Bessie L. Howison, (formerly Robinson,) and each of them, as his legitimate children." This finding is amply supported by the proofs. They were, during that period, living in their residence on Wabash avenue. The acts of each toward the other were those of husband and wife, and to said Martha J., Curtis E., Jr., and Bessie L., their children, who were members of the family, they deported themselves as father and mother. Their whole life was inconsistent with any other relation than that of husband and wife. A few months after the death of said Gottlieb Schoeninger, they, with the appellee children, visited the relatives of the husband, in Massachusetts. Curtis E., Sr., introduced Johannah to his kindred as his wife and the appellee children as their children. He manifested parental pride in the children, was anxious the appellee daughters should exhibit their proficiency in music to his kindred, and declared his satisfaction that through appellee Curtis E., Jr., his name would be perpetuated. A family reunion was held at the house of his brother, Nathan S., at which Curtis E., Sr., Johannah and the appellee children attended as a family. Johannah manifested a sympathetic feeling for some of the relatives of Curtis E., Sr., and made them gifts of money and other articles, and when she and said Curtis E., Sr., returned to their home in Chicago they brought with them the mother of Curtis E., Sr., an aged woman, who lived with

them in their home on Wabash avenue, as a member of their family, during the remainder of her life. They also invited Nathan S. Robinson and his daughter, Eunice, to visit them in Chicago. The invitation was accepted, and they were entertained as relatives in their home on Wabash avenue. A pew was rented in the South Park Avenue Church, and Curtis E., Sr., and Johannah attended services together there. Deeds were executed conveying to them property as husband and wife, naming them as such, and they uniformly treated and called each other husband and wife. Curtis E., Sr., applied for letters of administration on the estate of Johannah, declaring, under oath, therein that he was her widower. He received an engrossed copy of resolutions passed by a lodge of which he was a member, extending sympathy and condolence on the death of his wife, and he brought such copy home to the children. He directed her name, as Johannah Robinson, to be engraved upon the plate of her coffin, and an inscription to be engraved on her monument in which she was declared to be his wife, and caused to be published an obituary notice of her death, naming her as "Johannah, beloved wife of C. E. Robinson." A common law marriage was thus established, and such marriages are valid in this State. *Port v. Port*, 70 Ill. 484; *Elzas v. Elzas*, 171 id. 632.

The finding of the chancellor said Curtis E., Sr., and said Johannah, were lawfully married after the death of said Schoeninger, and that said Curtis E., Sr., acknowledged each of the appellee children as his children, was abundantly sustained by the proofs. The appellee children were properly regarded by the chancellor as the legitimate children and legal heirs of said Curtis E. Robinson, Sr.

The decree of the circuit court is affirmed.

Decree affirmed.

CARTWRIGHT and HAND, JJ., dissenting.

FRANK SUPPLE

v.

JOHN P. AGNEW *et al.**Opinion filed October 24, 1901.*

1. **APPEALS AND ERRORS**—*effect where the Appellate Court reverses without remanding.* If the Appellate Court reverses a judgment for the plaintiff without reciting the facts or remanding the cause, it must be presumed that the Appellate Court agreed with the trial court as to the facts but held them insufficient to sustain the cause of action, and on further appeal the Supreme Court can only look into the evidence and determine whether it fairly tends to prove the cause of action alleged. If it does, the judgment of the Appellate Court must be reversed, otherwise affirmed.

2. **PLEADING**—*what need not be alleged in action for negligence in not furnishing sufficient help.* A declaration which charges negligence by the defendant in failing to furnish a sufficient number of men to do the work with safety to the plaintiff need not contain a distinct allegation of a failure to do some act which would have permitted the work to be done with a less number of men than was necessary without such performance.

3. **MASTER AND SERVANT**—*master should provide sufficient help to do work.* It is the duty of the master to his servant to exercise reasonable care in furnishing an adequate number of co-laborers to assist in the performance of work of a hazardous nature.

4. **SAME**—*servant does not assume risk of work outside the scope of his employment.* If a servant is ordered by the master to work temporarily in another department of the business outside the scope of his employment and with which the master knows he is not familiar, he does not, by obeying such order, necessarily assume the risks incident to the work.

5. **LAW AND FACT**—*what questions in an action for negligence are for the jury.* Whether the defendant was negligent in not providing a sufficient number of men to assist in the work which the plaintiff was attempting to do when injured, and whether the injury was the result of the negligence of a fellow-servant, are ordinarily questions for the jury under the evidence and the instructions.

Agnew v. Supple, 80 Ill. App. 437, reversed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

191	439
s99a	20

191	439
197	1684

191	439
200	1424

191	439
s202	851

191	439
204	1836

191	439
110a	679

This is an action on the case, brought by the plaintiff in error against defendants in error, John P. Agnew, and John McGillen, and one Francis Agnew, since deceased, who composed the firm of Agnew & Co., to recover for personal injuries, claimed by plaintiff in error to have been sustained by him by reason of their negligence while he was in their employ. Verdict and judgment were in favor of the plaintiff in error for \$1500.00. This judgment has been reversed by the Appellate Court; and to reverse the judgment of the Appellate Court the present writ of error is sued out.

The judgment, rendered by the Appellate Court, was as follows: "On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error. Therefore, it is considered by the court that, for that error and others in the record and proceedings aforesaid, the judgment of the superior court of Cook county, in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed. And it is further considered by the court that the said appellants recover of and from the said appellee their costs, by them in this behalf expended, to be taxed, and that they have execution therefor."

The count of the declaration, upon which the case was tried, alleged that the defendants on, to-wit: January 6, 1893, were contractors, engaged in digging a certain trench or canal in said county, and, in said work, employed a large number of men as carpenters, laborers and otherwise, said carpenters being under the immediate direction and control of an agent or servant of defendants known as a boss-carpenter; and said laborers being divided into gangs, each gang being under the control and

direction of an agent or servant of defendants known as a gang-foreman; and said boss-carpenter, carpenters, gang-foreman and laborers being under the general control and management of an agent or servant of defendants known as a walking-boss, who was employed by defendants to manage, control and superintend the work of digging said canal, and to direct, manage and control all the servants of defendants engaged about said work; that plaintiff had theretofore been employed by defendants as one of said gang-foremen to oversee a gang of laborers in digging dirt from said canal, and to see that said gang performed its work in a proper manner, and for no other purpose whatever; and, on the day and in the county aforesaid, while plaintiff was so engaged as such gang-foreman, the said walking-boss, under whose control plaintiff had been placed by defendants, ordered plaintiff, contrary to the terms of his employment, as said walking-boss well knew, to temporarily assist said boss-carpenter about the construction of a certain bridge being then and there built by defendants across a certain stream, known as the DesPlaines river, said walking-boss well knowing that plaintiff was not a carpenter and was not versed or experienced in carpenter work or in construction of bridges, and said walking-boss ordered plaintiff to do whatever work said boss-carpenter should direct; and plaintiff, in obedience to said instructions, went to work with said boss-carpenter, and was by him directed to assist said carpenter in moving certain heavy timbers of great length along certain planks, which extended across certain abutments on either side of said river, upon which abutments said bridge was being built; and, for the purpose of more easily moving said timbers, defendants had provided a certain implement known as a "dolly," consisting of a small wooden platform, upon the lower side of which was a roller resting upon the ground; and plaintiff, in obedience to the order of said carpenter, helped to place said timber upon said dolly,

and was assisting said carpenter in moving said timber, with the aid of said dolly, across said planks; that it was then and there the duty of defendants to exercise reasonable care and diligence to furnish a sufficient number of persons to perform the work of moving said timber with reasonable safety, so that plaintiff should not be unnecessarily exposed to danger in the performance of said work, but defendants did not exercise reasonable care and diligence in that regard, but negligently and without due diligence failed to furnish more than one person to assist said boss-carpenter and plaintiff in the work of moving said timber, and said carpenter and plaintiff and one additional person were not a sufficient number of persons to move said timber properly and with safety to plaintiff, which fact defendants well knew, or by the exercise of ordinary care and diligence ought to have known, but of which fact plaintiff had no notice or knowledge; that he had never had any experience in moving heavy timbers at that time, which fact defendant and said boss-carpenter well knew; and, by reason of the failure of defendants to furnish a sufficient number of persons to perform the work of moving said timber, and while plaintiff was engaged as aforesaid in assisting to move said timber, and while he was in the exercise of all due care and caution on his part, said timber slipped and fell from said dolly and struck plaintiff with great violence and threw him with great force against one of said abutments, and thence upon the ground, and into said river, and upon the ice therein, thereby striking and injuring his back and left hip, wrenching and spraining his spine, causing him a severe nervous and physical shock, and great pain and anguish, by reason whereof, etc.

The count was amended before the trial so as to give a more particular description of the runway, and alleged that said planks were to-wit: ten feet above the surface of said river, and extended from abutment to abutment the entire width of said river, the said abutments being,

to-wit: twenty feet apart, said planks constituting a continuous runway of to-wit: four feet in width for said dolly; that, in order to move said timbers by means of said dolly properly and with reasonable safety along said runway, it was necessary for defendants to furnish for such purpose a number of men to-wit: five men, to hold said timbers in place upon said dolly, and to prevent said timbers from rolling, falling, or shifting while said dolly with said timber was being moved along said runway, but that they failed so to do, etc.

A gang of men was engaged in excavating and constructing a section of the drainage canal in Cook county. One Burke, who employed the plaintiff on behalf of the defendants in error, was the general foreman of the defendants, and had known the plaintiff for eight or ten years. Plaintiff went to work November 22, 1892, and continued in the employ of the defendants until January 6, 1893, when the accident in question occurred. He was employed as boss of a wheel-barrow gang, engaged in taking out the dirt as it was excavated from the ditch, putting it on wheel-barrow and wheeling it up on the embankment; that the business of the defendants was divided into departments, and that one Charles Burns, called a "walking-boss" or general foreman, was plaintiff's immediate boss. On the morning of the accident plaintiff went to work with his wheel-barrow gang, and started his men to work. Burns came to him and told him to turn his men over to another foreman. Burns said that Morse, the carpenter foreman, had no men that morning, and he wanted plaintiff to go with Morse and help him on the bridge, Morse being the carpenter foreman employed by Agnew & Co. When Burns instructed plaintiff to go and help Morse on the bridge, plaintiff told Burns that he was not a carpenter and knew nothing about bridge building, and Burns told him to go along, and do what Morse should tell him to do. Plaintiff then joined the carpenter foreman and, under his direction,

began to assist him in moving some heavy timbers across a temporary bridge or runway spanning the DesPlaines river. The runway was one hundred and forty feet long, four feet wide, and about ten feet above the river, which was frozen over. The plan appears to have been to move some heavy logs twenty to twenty-six feet in length, and from twelve to sixteen inches in diameter at the butt, and about ten to twelve inches at the small end, along this runway for the purpose of making a temporary bridge for construction purposes. Morse, the carpenter foreman, provided an implement called a "dolly," a mechanical device consisting of a wooden platform of about fourteen by sixteen inches, under the center of which a roller was attached about four inches in diameter. The log was to be placed on the dolly, so that it would balance, and was then to be shoved along the runway on the roller. Morse and plaintiff started to move a log on the runway, but were unable to make much progress, when one Brown, a time-keeper of the defendants, who was passing by, gave the log a push, and so helped to start it, and then stepped back, and went off. Plaintiff and Morse continued without assistance to move the log when "the timber and dolly went down into the river." The big end went down first, and the little end struck plaintiff on the leg, and pitched him against the abutment. His breast struck against one of the abutments, and from there he fell down backwards onto the ice.

MORRIS ST. P. THOMAS, and DARROW & THOMPSON,
for plaintiff in error.

O. W. DYNES, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this case the Appellate Court by its judgment has reversed the judgment of the trial court, but did not remand the cause for another trial, and did not recite any

finding of facts in its judgment. It is to be presumed, that the Appellate Court found the facts the same as the trial court found them; otherwise it would have recited its findings in its judgment, as required by the statute. It is also to be presumed, that the Appellate Court did not reverse the judgment of the trial court for any erroneous rulings on questions of law arising on the trial, such as the giving or refusal of instructions, or the admission or exclusion of evidence, because, if it had reversed the judgment for any such erroneous rulings, it would have remanded the cause for another trial, so that such errors could be avoided. Inasmuch as the Appellate Court has found the facts the same as the trial court found them, and has not reversed its judgment for any erroneous ruling on the trial, it must be presumed that the Appellate Court held the facts, as found both by it and the trial court, to be insufficient to sustain the cause of action. That the presumptions thus indicated arise upon such a record, as is here presented, is decided by this court in the recent case of *Busenbark v. Saul*, 184 Ill. 343, where a large number of decisions upon this subject is referred to. It results, as a necessary consequence of the doctrine thus announced in *Busenbark v. Saul*, *supra*, that we can do nothing more upon this record than to look into the evidence, and determine whether it fairly tends to establish the cause of action alleged. If the evidence fairly tends to establish the cause of action alleged, the judgment of the Appellate Court must be reversed; otherwise it must be affirmed.

We are of the opinion, that the count of the declaration, set forth in the statement preceding this opinion, stated a cause of action; and we are furthermore of the opinion, that the evidence tends to establish the cause of action, so stated.

The evidence tends to show, that the plaintiff in error was employed to superintend a gang of diggers and wheel-barrow men, and for no other purpose. He was

called from the work, for which he had been employed, and placed temporarily at work in another department of the master's business under the control and direction of a foreman, whose work was in a distinct department from that of the plaintiff, and with whom the plaintiff had never been associated. Burns, the "walking-boss," was expressly informed by the plaintiff in error, before he went to work with the dolly, that he had no knowledge of such work. The evidence tends to show, that the defendants in error failed to supply a sufficient number of men to assist the carpenter foreman and plaintiff in error in moving the timber, and that the plaintiff in error, because of his lack of experience in such matters, had no knowledge or notice that more men were required to do the work in safety. The evidence tends to show, that plaintiff in error was injured by reason of the negligence of the defendants in error in not furnishing an adequate number of experienced men. The declaration alleges that the defendants in error, the masters of the plaintiff in error, were negligent in failing to furnish a sufficient number of men to do the work with safety to the plaintiff in error under the conditions, as they existed.

There is evidence tending to show, that work of the character, which the plaintiff in error was required to do, was dangerous, and that, in order to move the logs in question across the runway in question, it was necessary to have an adequate force of men acquainted with that particular work. Several witnesses testify, that the log when placed upon the dolly, should have been blocked, tied or in some way fastened thereto to prevent its shifting, and that, where the log was not blocked or fastened, a larger number of men was necessary to move it with safety than would otherwise have been needed. Several witnesses swear that there should have been five or six men to handle the log if it was blocked; and there is testimony tending to show that a greater force was necessary where the log was not blocked.

It was not necessary, that there should be a distinct allegation in the declaration of a failure to block or fasten the timber. That fact was only one circumstance, which rendered it necessary to employ more men on the work, and the declaration alleged the negligence of defendants in error in failing to furnish a sufficient number of men to do the work with safety to plaintiff in error.

It is as much the duty of the master under such circumstances as are here shown by the record in this case to furnish an adequate number of competent co-laborers as it is to furnish sufficient and suitable implements and machinery. "The master owes a duty to his servant to exercise reasonable care in supplying for the performance of the work an adequate number of fit and competent servants, and for failure of duty in this respect he is responsible in damages to a servant injured in consequence thereof." (Bailey on Master's Liability, p. 68; *Swift & Co. v. Rutkowski*, 182 Ill. 18).

Shearman & Redfield, in their work on Negligence (5th ed. sec. 193) say: "Another duty, which the master owes to his servant, is that of employing a sufficient number to do the work so far as may be necessary to enable them to do it in safety; but, as in other cases, he is only bound to use ordinary care for that purpose. It is not always consistent with such care, however, to provide a force just sufficient for the regular every-day course of business. Preparation must be made for those extraordinary emergencies which, although they do not frequently occur, are still known in common experience to be likely to occur occasionally." (*Flike v. Boston and Albany Railroad Co.* 53 N. Y. 549; *Booth v. Boston and Albany Railroad Co.* 73 id. 38; *Northern Pacific Railroad Co. v. Herbert*, 116 U. S. 642). In the latter case, the Supreme Court of the United States, speaking by Mr. Justice Field, said: "The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with

which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provision that no danger shall ensue to him." (*Mad River and L. E. R. Co. v. Barker*, 8 Ohio St. 541; *Moss v. Pacific Railroad Co.* 49 Mo. 167).

Whether, in the present case, the master did furnish a sufficient number of men to assist in the work, in which plaintiff in error was engaged, was a question of fact for the jury. The jury found that fact in favor of plaintiff in error; and the Appellate Court must have also found the fact in the same way, inasmuch as it did not insert a contrary finding in its judgment.

The plaintiff in error was taken away from his regular employment of superintending a gang of diggers and wheel-barrow men, and was put to work in another and separate department of the master's business, that is to say, the carpenter-work department, under the supervision and control of a foreman of the latter department. It is well said: "The servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed; and if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work." (14 Am. & Eng. Ency. of Law,—1st ed.—p. 856; Buswell on the Law of Personal Injuries, sec. 212; *Lalor v. Chicago, Burlington and Quincy Railroad Co.* 52 Ill. 401; *Banks v. City of Effingham*, 63 Ill. App. 221; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Pittsburg, Cincinnati and St. Louis Railway Co. v. Adams*, 105 Ind. 152; *Mann v. Oriental Print Works*, 11 R. I. 152; *Cole v. Chicago and Northwestern Railroad Co.* 71 Wis. 114; Bailey on Master's Liability, p. 220).

If the injury to the plaintiff in error occurred by reason of the failure of defendants in error to furnish a sufficient number of men to do the work, which he was required to assist in doing, it would seem to be immaterial whether the carpenter foreman, with whom the plaintiff in error worked, and the plaintiff in error were fellow-servants or not; but whether they were fellow-servants or not was a question for the jury. (*Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Hawthorn*, 147 Ill. 226; *Chicago and Alton Railroad Co. v. O'Brien*, 155 id. 630; *Consolidated Coal Co. v. Scheiber*, 167 id. 539; *Illinois Steel Co. v. Bauman*, 178 id. 351). It must be presumed, here, that the question of fact as to fellow-servants was determined by the jury and the trial court in favor of the plaintiff in error; otherwise, the judgment in the court below would have been for the defendants.

It thus appears in this case, *first*, that the Appellate Court has found the facts the same as the trial court; *second*, that the Appellate Court found no errors of law committed by the trial court either in the giving or refusal of instructions, or in the admission or exclusion of evidence; *third*, that the Appellate Court must have reversed the judgment without remanding the cause, because it was of the opinion that the evidence does not fairly tend to establish the cause of action, alleged in the declaration. We are of the opinion that the Appellate Court erred in thus interpreting the evidence, and that there is proof in the case, tending to establish the cause of action alleged in the declaration.

The writer of this opinion entertains the view that the judgment of the Appellate Court ought to be reversed and the cause remanded to that court with directions to affirm the judgment of the superior court; but, in conformity with the opinion of the majority of the court, the judgment of the Appellate Court is reversed, and the cause is remanded to that court, being the Branch Appellate Court for the First District, with directions to

enter such judgment, reversing and remanding, or affirming the judgment of the superior court of Cook county, as, in their judgment, may be proper, or reciting in their judgment the facts found by them, if any such final determination of the cause is made by them as is provided for in section 87 of the Practice act. Leave is given to withdraw the record of the superior court filed in this court for the purpose of filing it in the Appellate Court.

Reversed and remanded.

ELIZABETH BLANCHARD

v.

HARRY BLANCHARD *et al.*

Opinion filed October 24, 1901.

1. EVIDENCE—*burden of proving insanity of grantor is upon person alleging it.* The burden of proving insanity or undue influence upon the mind of a grantor, for the purpose of having his deed set aside, is upon the person alleging the same.

2. SAME—*when defendant may testify under the third exception to section 2 of the Evidence act.* In partition, by heirs against the wife of their deceased ancestor, if the complainants testify to conversations had between them and the defendant before the death of her husband and in his presence, in which it is claimed she made certain declarations tending to support the allegations of the bill, she has the right, on rebuttal, under clause 3 of section 2 of the Evidence act, to testify, for the purpose of disproving or explaining such conversations or declarations.

3. SAME—*right to cross-examine witness to show hostile feeling.* A defendant is not bound by a statement of complainant's witness, on cross-examination, that he has no ill-will or prejudice against the defendant, and the witness may be asked whether he did not make certain statements or declarations (specifying them) tending to show such ill-will; and unless the witness denies making them it is not necessary that the time and place be specified as a proper foundation for impeachment.

APPEAL from the Circuit Court of Edgar county; the Hon. H. VANSSELLAR, Judge, presiding.

Appellees, who are the adult heirs of Bruce B. Blanchard, deceased, filed their bill in the circuit court of Edgar county, against Elizabeth Blanchard, their step-mother, and nominally against their infant brother and sister, to partition eighty acres of land which had formerly belonged to their father. The bill alleges that Bruce B. Blanchard was married to the appellant, Elizabeth Blanchard, July 14, 1898, a little more than a year after the death of his first wife, and that on December 5, 1898, he executed and delivered to appellant a deed of the land in controversy. By the terms of the deed the grantor reserved to himself the use and occupation of the land during his lifetime, together with the right to sell and convey the same to whomsoever he might elect, and the deed was not to be recorded until after the death of the grantor. No revenue stamp was placed upon the deed at the time. Appellant took possession of the instrument and retained it until the death of her husband and then had it recorded, placing a stamp thereon before recording. The bill prays partition of the land subject to the dower rights of appellant, and that the deed to appellant may be set aside as a cloud upon the title of appellees, for the reasons that upon its face the instrument is void on account of conditions therein contained, and was not stamped until after the death of the grantor; and for the further reasons that, even if valid upon its face, the deed is void because procured through the undue influence of the grantee, and because, at the time of execution, the grantor was not of sound mind.

The circuit court held the instrument a valid deed upon its face, and that, as such, it was evidence of appellant's title. The questions of fact as to undue influence exercised by appellant over the mind of the grantor, and as to his mental unsoundness, the court below, on its own motion, referred to a jury upon feigned issues, and the jury found both issues in favor of appellees. The court overruled a motion to set aside the findings of the

jury and render a decree in appellant's favor, or else to grant a new trial, and rendered a decree holding the deed void upon the findings of the jury and granting partition as prayed in the bill. From that decree appellant prosecutes this appeal.

J. F. VANVOORHEES, J. W. HOWELL, and DUNDAS & O'HAIR, for appellant.

JAMES A. EADS, HENRY S. TANNER, and VANSSELLAR & SHEPHERD, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

For the purposes of this opinion it is merely necessary to state that we think the court below committed no error in holding the instrument which is sought to be set aside as a cloud upon the title of appellees to be a good and valid deed upon its face.

It is contended by appellant that the court below erred in directing that she should assume the burden of proof, and should first introduce all her evidence in support of the validity of the deed, upon the issues of insanity and undue influence. This was clearly error. The burden of proving insanity or undue influence upon the mind of a grantor, for the purpose of setting aside his deed, is upon the person alleging it. (*Devlin on Deeds*, sec. 84; *Howe v. Howe*, 99 Mass. 88; *Roe v. Taylor*, 45 Ill. 485; *English v. Porter*, 109 id. 285; *Francis v. Wilkinson*, 147 id. 370). But while this direction of the circuit court was erroneous, we do not think the appellant was so unduly prejudiced thereby as to warrant a reversal of this case for that reason, particularly as the verdict of the jury upon feigned issues, as in this case, is merely advisory to the court, and may be acted upon or rejected by it, accordingly as it is or is not satisfied with it. (*Meeker v. Meeker*, 75 Ill. 260; *Titcomb v. Vantyle*, 84 id. 371; *Guild v. Hull*, 127 id. 523). The decree is not the finding of the

jury, but is the finding of the court deduced from its own opinion, formed after hearing the evidence submitted to the jury and from the advisory verdict of the jury.

We cannot hold, as requested by appellant, that the decree was so clearly against the evidence that it should be reversed for that reason, but as the cause must be remanded for another trial because of erroneous rulings of the circuit court in excluding testimony, we think it inadvisable to express any opinion upon the weight of the evidence.

The complainants were suing as heirs of their deceased father, the said Bruce K. Blanchard, and therefore the appellant, who was defendant below, was, by virtue of section 2 of the act in regard to evidence, rendered incompetent to testify in her own behalf, except as permitted by some one or more of the exceptions mentioned in clauses 1 to 5 of said section. (Hurd's Stat. 1899, p. 858.) Certain of the heirs, parties in interest, testified to certain conversations had between them and the appellant before the death of her husband and in his presence, and as to certain declarations made by her in such conversations which tended to sustain their allegations of undue influence, and perhaps in other respects to sustain their bill. When she came to testify in her own behalf in rebuttal, her counsel sought to disprove or explain these conversations, or at least to disprove the declarations which said witnesses for complainants had testified she had made, but the court refused to allow her to testify as to such conversations or declarations, because they were had or made in the lifetime and in the presence of her husband, the ancestor of complainants, who were suing as his heirs. For example, Effie Blanchard, who was one of such heirs and a party in interest, although made a defendant to the bill, testified that on one occasion when members of the family, including her father and appellant, were sitting by the grate at their home, appellant said to witness: "We will fix it so you

will, none of you, get anything; we will have that fixed; your pap will fix that." On rebuttal, the court refused to allow appellant to testify as to such declaration, either in explanation or denial, but limited her to transactions, conversations or declarations which took place out of the presence of said Bruce K. Blanchard. In so ruling the court erred. By section 1 of the act in regard to evidence appellant would have been competent. By said section 2 she was rendered incompetent to testify in her own behalf in a suit against her by the complainants, as heirs of her deceased husband, except as to matters falling within one or more of the five exceptions mentioned by the statute. The third one of these exceptions is as follows:

"Third—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction."

Under this exception she was clearly competent to testify in rebuttal as to transactions or conversations between herself and an opposite party or party in interest, after such opposite party or party in interest had testified to such conversation or transaction,—and on this point it would be immaterial whether the husband was present or not. There is nothing in section 5 of the act which would exclude her testimony on the ground that it related to conversations or transactions between husband and wife, for in this case they were between appellant and these heirs, and no admission of or conversation with the husband was involved. To construe the statute so as to allow the heirs to give their own version of what appellant said, without allowing appellant

to give hers, or either to deny or explain, would lead to gross injustice, and render the statute partial and unequal in its operation on the rights of parties when it was intended to operate equally and impartially.

In the second place, we are of the opinion that the court erred in unduly restricting appellant's right of cross-examination of the complainants' witnesses upon the question whether they were hostile to appellant, or were biased or prejudiced against her or in favor of the opposite parties, or were actuated by ill-will against her. Without specifying the particular questions or rulings complained of, some of which rulings were correct for other reasons, the court announced a rule by which counsel should be governed in examining witnesses, and which the court thereafter enforced against the objections and exceptions of appellant, which rule the court stated as follows: "The witness can be asked, 'Have you any feeling against the party?' The witness is then to determine by his answer, and he cannot be questioned any further." We do not regard this as the correct rule. A party is not bound by the statement of a witness, on cross-examination, that he has no ill-will or feeling of any kind against the opposite party, but may cross-examine such witness further, to ascertain whether such statement is true or not, or what weight should be given to it. As said by Mr. Thompson in his work on Trials (sec. 450): "It is one of the objects of cross-examination to discover the motives, inclinations and prejudices of the witness, for the purpose of reducing the effect which might otherwise be given to his evidence. Accordingly, it has been well said that it is always competent to show the relations which exist between the witness and the party against, as well as for, whom he was called. * * *

It is competent to inquire of the witness concerning acts, declarations and circumstances showing the existence of hostile feelings or prejudices. The state of mind and feeling of the witness may materially affect his testi-

mony, and the credit of a witness upon whose testimony, in part, the issue is to be determined is not collateral and immaterial matter."

It is not meant, of course, that the particulars of collateral matters and transactions may be inquired about on cross-examination, thus introducing other issues into the trial, but the witness, although he may have answered that he has no ill-will or prejudice against the party, may be asked whether he has not made certain statements or declarations (specifying them) tending to prove such ill-will or prejudice,—and this, too, whether the proper foundation, by specifying time and place, has been laid or not, for the witness may admit having made such statements or declarations, in which case no impeaching witnesses to prove them need be called. It is, of course, true, that before impeaching witnesses can be called to prove that the witness did make such statements or declarations, when he has denied that he made them, the proper foundation must be laid before their testimony can be heard; but the failure to lay such foundation is not, and for the reason above given, a sufficient ground for sustaining an objection to the question, unless, indeed, it appears to the court that the witness is unable to answer without having his attention called to time and place, or to other circumstances which would be likely to refresh his recollection. (*Phenix v. Castner*, 108 Ill. 207; *Aneals v. People*, 134 id. 401.) Large discretion is committed to the trial judge in directing and controlling the examination of witnesses, but it is a well known rule also that great latitude is allowed the parties in the cross-examination of witnesses, and especially of such witnesses as may show a bias for or against either party.

For the reasons given, the decree will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinbefore expressed.

Reversed and remanded.

W. W. WHITLOW *et al.*

v.

THE TRUSTEES OF SCHOOLS, etc.

Opinion filed October 24, 1901.

PUBLIC OFFICERS—*township treasurer should keep books to show condition of accounts.* A township treasurer should keep his books so as to show the exact condition of his accounts, and he has no right, in case of his defalcation, to require the township trustees to ascertain the amount due, and insist that they be bound by the amount which they agreed to accept, in the belief that it was correct, but which was afterward found to be too small, owing to misrepresentations by the treasurer as to certain credits claimed by him and allowed by the expert employed by the parties interested, including the trustees, on the faith of such representations.

Whitlow v. Trustees of Schools, 93 Ill. App. 664, affirmed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

ZINK, JETT & KINDER, and MILLER & MILLER, for plaintiffs in error.

LANE & COOPER, for defendants in error.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This action in debt was brought in the circuit court of Montgomery county by the trustees of schools in and for township 11, range 14, in that county, against W. W. Whitlow as principal and the other plaintiffs in error as his sureties on his official bond as township treasurer of said township for the term expiring April 4, 1898. The breach assigned in the declaration is the failure of the principal to pay over to his successor in office, C. H. Ball, the school funds of the township, amounting to \$2000. On issue joined, a trial by the court without a jury re-

sulted in a judgment for plaintiffs for \$1832.68 and costs. From that judgment an appeal to the Appellate Court for the Third District was prosecuted by the defendants, where the judgment of the circuit court was affirmed, and they now bring the cause here by writ of error.

It appears that Whitlow had been appointed treasurer of the township for several successive terms, and upon the appointment of his successor in April, 1898, he failed to pay over a large amount of the school funds of the township. Suit being threatened, the sureties upon the bond now in suit claimed that the defalcation occurred during the prior term, and that the sureties upon the bond for that term should be held responsible, and not they. All parties interested agreed that one H. H. Keithley should examine the books and accounts of Whitlow and report the total amount of his shortage. Keithley reported the amount to be \$3182.46, and it was agreed by and between the sureties on this and the prior bond and the trustees, that the sureties should each severally pay an equal part of that sum, and that the trustees would receive the same in full of all Whitlow's defalcation. On January 4, 1899, the money was paid and a receipt given therefor, "in full of the shortage of William W. Whitlow, ex-school treasurer of said township," signed by the trustees. Subsequently it was ascertained, as claimed by the trustees, that there was a mistake in the report of Keithley, against the township, amounting to \$1776.81, and that the total defalcation was \$4959.27 instead of \$3182.46, and they demanded of defendants payment of \$1776.81 and interest, which being refused, they brought this suit.

Plaintiffs in error insisted upon the trial and in the Appellate Court (and a very large part of their argument in this court is devoted to the same subject, in violation of our rules,) that the evidence failed to prove there was any mistake in the former settlement. Conceding that the evidence was conflicting upon that issue, which is the very most that can be claimed, it has been conclu-

sively settled to the contrary. In fact, any other finding would have been manifestly against the evidence. Whitlow himself does not claim that he paid to his successor this sum of \$1776.81, or any part of it, but only that he had arranged with the bank in which he kept his accounts, to pay it for him, which it failed to do. Not only does the evidence clearly show the mistake, but it also shows that it resulted from Whitlow's own false representations. Keithley testified, referring to page 89 of the book: "Whitlow's term of office expired April, 1898, and Ball was appointed in his stead, and on this page I find credits as late as May 28, 1898. I asked Whitlow if he was entitled to these credits, and he said he was; that the book was balanced April 2, 1898. I told him he was mistaken. We had a dispute over it. He claimed it was not his handwriting—that it was similar and a clever forgery. I told him if he was entitled to the credits I would give them to him. I wanted him to bring in the vouchers, but he did not, so I could not verify the credit side. He said the vouchers were at home, and he admitted it was his handwriting, and I gave him credit for it.

* * * The aggregate amount of these warrants is \$1832.68. These warrants were included in the first computation from the fact I had nothing to verify the credit side of the books. He claimed credit and I allowed it to him. These stub-books were in the hands of the district clerks at that time. The second time I went over the accounts the district clerks were called in with their stub-books, reports and account books, and I compared them with Mr. Whitlow's and Mr. Ball's books."

The only question properly before this court is upon the assignment of error that the trial court erred in refusing to hold certain propositions submitted by the defendants as the law applicable to the case. Eleven of such propositions were presented to the judge and each refused. We shall not attempt to set them out at length. The scope and purport of each of them were, that plain-

tiffs should be concluded by the payment of the \$3182.46. They proceed upon the theory that the settlement was the compromise of a doubtful claim between the township trustees and the treasurer, Whitlow. This is a suit upon the official bond of the township treasurer by the trustees of the township, acting for and on behalf of the public. They neither had the right nor did they attempt to compromise the breach of the bond. They could not give away the money of the township. (*Cumberland County v. Edwards*, 76 Ill. 544; *Kinney v. People*, 3 Scam. 357; *Washington County v. Partier*, 5 Gilm. 232.) They simply sought to recover the amount due the township—no more and no less. It was not only the duty of the treasurer to safely keep and faithfully pay over to his successor all moneys in his hands belonging to the township, but he was also under bond to keep the books of his office so as to show the exact condition of his accounts. He had no right to call upon the trustees to hunt up and ascertain what amount he had failed to pay over. There was at the time of the settlement,—or, as counsel term it, “the accord and satisfaction,”—no dispute between the parties as to how much the treasurer should account for when that amount should be ascertained, and all that was sought to be done through Keithley was to ascertain and state that amount. It does not lie in the mouth of the defaulting officer to say that if the evidence of the facts was available to all parties at the time of the settlement the plaintiffs are bound by it.

If this had been a suit between individuals upon a mere matter of account or contract between them, some of the propositions submitted to the court would perhaps have been proper to be held; but as a statement of the law applicable to the facts of this case they are clearly erroneous.

The judgment of the Appellate Court is right and will be affirmed.

Judgment affirmed.

GEORGE P. BLISS

v.

SILAS E. SEELEY *et al.*

191	461
101a	264
191	461
e105a	888

Opinion filed October 24, 1901.

1. **WILLS**—*when recorded copy of foreign will does not operate as notice.* Under section 9 of the act on wills and section 33 of the Conveyance act, an authenticated copy of a foreign will, although recorded in Illinois, does not operate as notice to third persons acquiring interests adverse to those of the devisees, where the certificate accompanying the will does not state that the will “was duly executed and proved agreeably to the laws and usages” of the State or country where the will was made.

2. **SAME**—*when foreign will is not effective as against purchasers.* A foreign will is not effective as against persons acquiring lands adversely to the devisees without actual notice, where no exemplified or properly certified copy of the will has been recorded in Illinois.

3. **SOLICITORS' FEES**—*evidence must be preserved to sustain allowance in partition.* To sustain an allowance of complainant's solicitor's fee as costs in partition, the evidence as to the value of the services must be preserved in the record, either by the recitals of the decree or in the certificate of evidence.

4. **SAME**—*defense need not be successful to be of a substantial character.* Under the statute allowing the court to apportion complainant's solicitor's fee in partition, if the rights of the parties are correctly set forth in the bill, unless some defendant shall interpose a good and substantial defense, the defense referred to need not be successful if of a substantial character, and not merely formal, frivolous or vexatious.

APPEAL from the Circuit Court of Shelby county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

This is a bill for the partition of one hundred and sixty acres of land in Shelby county, filed originally on September 3, 1900, by the appellee, Silas E. Seeley, against the appellant, George P. Bliss, and the following persons, to-wit: Absolom H. Kercheval, George A. Hall, Estella Denham, Caroline McDonald, James C. Hall, Dora A. Hall, Sarah S. Smith, Minnie Cloe, Etta B. Middleton and Mary Jane Pollock. The original bill prayed for a division of the lands between appellee, Silas

E. Seeley, and the appellant, George P. Bliss, and Mary Jane Pollock, according to their respective interests.

On December 3, 1900, the appellant, George P. Bliss, filed a demurrer to the bill upon the ground that it did not appear therefrom that the complainant therein had any interest in or title to the premises described in the bill. The bill was amended, and as amended was again demurred to. The demurrer to the amended bill was sustained, and the bill was again amended not only by changing the allegation therein as to the nature of the complainant's interest in the property, but also by making Mary Jane Pollock a party complainant. To the bill as finally amended the appellant, George P. Bliss, filed a separate answer.

Subsequently, on January 1, 1901, one Annie E. Hall, who is shown by the record to have been the wife of Newton W. Hall, filed her petition asking to be made a party defendant to the bill, and claiming an interest in the premises under the alleged will of David William Hall hereinafter mentioned. Leave was finally given to Annie E. Hall, after her original petition had been stricken from the files by consent, and after she had filed an amended petition, to become a defendant in the cause, and to file an answer to the bill. Annie E. Hall did file an answer to the bill, setting up the interest claimed by her. Replications were filed to her answer and to the answer of George P. Bliss.

The bill was taken for confessed against all the defendants thereto except Bliss, Annie E. Hall and Mary Jane Pollock.

On March 7, 1901, a decree was rendered in the cause, ordering that partition be made between Silas E. Seeley, Mary Jane Pollock, Annie E. Hall and George P. Bliss, and appointing commissioners to make the partition, directing them to give to the said last named parties certain undivided interests in and to said premises, as therein mentioned.

The commissioners reported that the premises were not susceptible of division, and appraised the value of the same at \$9000.00. Thereupon, upon the same day, a decree was entered for the sale of the property by a special commissioner therein named; and, by the terms of this decree, the solicitor of the complainant below, the appellee here, Silas E. Seeley, was allowed a fee of \$500.00 for his services, and said allowance so made was directed to be taxed and paid as costs. Exception was taken by the appellant, Bliss, and appeal perfected to this court.

The only errors assigned in this case are assigned by the appellant, George P. Bliss. No errors or cross-errors are assigned by Newton W. Hall, or Annie E. Hall, or Mary Jane Pollock.

The facts in the case, as set up in the pleadings and proofs, and as shown by the report of the special commissioner and by the decrees of the court, are as follows:

On or about September 15, 1886, one James A. Hall was the owner of the one hundred and sixty acres in question, and on said last mentioned day died testate, leaving Caroline Hall, his widow, and David William Hall, Newton W. Hall, Estella Hall, Harriet A. Hall, Sarah S. Hall, Etta Belle Hall, Minnie Hall, James C. Hall, George A. Hall and Mary Jane Hall, his children and only heirs. By the terms of his will James A. Hall left all his property, both real and personal, to his widow, Caroline Hall, during her natural life, or as long as she should remain his widow; and, in case she should marry, bequeathed to her one-third part of all his estate. The will directed that, at the death of the testator's wife, should she remain his widow, his estate should be divided among ten of his children, including Bertie Hall, and excluding Mary Jane Hall, giving and bequeathing equal portions of his estate to them, share and share alike. By his will he gave to his daughter, Mary Jane Hall, the sum of \$5.00. The will also provided that, in case his

wife, Caroline, should marry again, she should have one-third of all the testator's estate, both real and personal, and that the remainder thereof should be divided among his children above named, excluding Mary Jane Hall. Bertie Hall died without issue before the death of James A. Hall.

David William Hall, Newton W. Hall and Mary Jane Hall, above named, were the children of the testator by a former wife, and were not the children of Caroline Hall. All the other children above named were the children of Caroline Hall.

On or about April 25, 1887, David William Hall died at Pueblo in the State of Colorado. Upon the theory that he died intestate, he left, as his heirs-at-law, his brothers and sisters, being the nine children of James A. Hall above named, including Mary Jane Hall, and excluding Bertie Hall.

In July, 1888, Harriet A. Hall married one Absolom H. Kercheval, and afterwards, in June, 1889, died intestate and without children, and leaving, as her only heirs-at-law, her husband, Absolom H. Kercheval and her eight brothers and sisters above named, being the children of James A. Hall then living.

Subsequently, Estella Hall married William Denham; Sarah S. Hall married Noble E. Smith; Minnie Hall married one Cloe; Etta B. Hall married William M. Middleton; and Mary Jane Hall married one Pollock.

In November, 1899, Caroline Hall, the widow of James A. Hall, married Thomas McDonald.

The bill, as originally filed, alleged that, on September 12, 1891, D. L. Colbert, sheriff of Shelby county, conveyed to complainant, Silas E. Seeley, all the undivided interest that Newton W. Hall had in and to the one hundred and sixty acres described in the bill. The bill, as finally amended, alleged that one John W. Ardery recovered a judgment against Newton W. Hall for the sum of \$634.25 and costs, on which execution was issued on May

2, 1890, directed to the sheriff of Shelby county to execute; that, thereunder, the sheriff levied upon all the interest of Newton W. Hall in and to the lands described in the bill; that the lands were duly advertised for sale and struck off and sold to Ardery, to whom a certificate of purchase was issued by the sheriff; that Ardery afterwards assigned said certificate to Silas E. Seeley; and that, on September 12, 1891, the time of redemption having expired, the sheriff executed a deed to Seeley of all the interest of Newton W. Hall in and to said lands. The proceedings, showing the judgment against Newton W. Hall and the sale, were introduced in evidence. The sheriff's deed was also introduced in evidence.

On July 3, 1900, Absolom H. Kercheval and Linnie A., his wife, (being his second wife after the death of Harriet A., above named,) George A. Hall and Lola, his wife, Estella Denham and William, her husband, Caroline McDonald and Thomas, her husband, James C. Hall and Dora A., his wife, Sarah S. Smith and Noble E., her husband, Minnie Cloe, and Etta B. Middleton and William M., her husband, executed a deed to the appellant, George P. Bliss, conveying to him their interests in said one hundred and sixty acres, which said deed was recorded in the recorder's office of Shelby county on August 12, 1900.

The answer of the appellant, Bliss admitted the allegations of the bill substantially as above set forth, except that it denied that Seeley acquired any interest in the premises by virtue of the judgment, certificate of sale and sheriff's deed, above named. The answer also denied that the respective rights and interests of the parties in said bill were correctly stated therein, and denied that complainant was entitled to any relief.

In her petition to be made a party defendant to the bill, and in her answer to the bill, Annie E. Hall denied that David William Hall, the brother of her husband, Newton W. Hall, died intestate, and averred that, on or

about April 10, 1885, David William Hall died testate and left a last will and testament, by the terms of which he devised all his interest in the estate of his father, James A. Hall, deceased, to her, the said Annie E. Hall, in consideration of money furnished to him by her during his two years' sickness. Her petition and answer also alleged that, on March 12, 1900, the will of David William Hall was proven and admitted to probate in the probate court of Hitchcock county, Nebraska, and that, by the terms of said will, she became the owner of all the interest of David William Hall in the lands sought to be partitioned.

When the testimony was taken before the special commissioner, to whom the cause had been referred to take the evidence and report conclusions, the solicitor of Annie E. Hall introduced in evidence what purported to be a transcript of proceedings in the probate court of Hitchcock county, Nebraska, in the matter of the estate of David William Hall, deceased, exemplified and certified to by C. W. Shurtleff, county judge and clerk and custodian of the records in said Hitchcock county. These proceedings recite that on February 16, 1900, Newton W. Hall filed a petition in the county court of Hitchcock county in the matter of said estate, setting up that David William Hall died at Pueblo, Colorado, April 25, 1887, and left no widow or children, and certain persons as his heirs, and praying for the admission of said will to probate. The proceedings further show that notice was given by publication for three successive weeks, and that a hearing was had by said probate court of Hitchcock county on March 12, 1900, on which date an order was entered admitting said will to probate. This will bore date April 10, 1885, and, by its terms, David William Hall willed "my interest, right and title of my share of my father's estate in Shelby county, Illinois, to Annie Hall, the wife of Newton Hall, for money furnished me during two years' sickness." The will purported to be signed

by two subscribing witnesses living in the town of Stratton in Hitchcock county, Nebraska. To the will was attached a certificate, signed by C. W. Shurtleff as county judge for the county of Hitchcock, aforesaid, and dated December 10, 1900. This copy of the will of David William Hall, together with the proceedings above mentioned, and the certificate thereto attached, was recorded in the recorder's office of Shelby county on December 17, A. D. 1900, several months after the present suit for partition was begun.

Counsel for Annie E. Hall also introduced in evidence a will of David William Hall, exactly the same in terms as the will last above mentioned, but dated April 10, 1887, instead of April 10, 1885, which was witnessed by the same two subscribing witnesses, and to which was attached a similar certificate by the county judge, said certificate, however, being dated November 12, 1900, instead of December 10, 1900. The will, dated April 10, 1887, purported to have been admitted to probate in the county court of Hitchcock county on the same day, to-wit: March 12, 1900, on which the will of April 10, 1885, was probated; but the said will of 1887, together with the certificate thereto attached, was never recorded in Shelby county either in the probate or county court of said county, or in the recorder's office of said county.

The special commissioner, to whom the cause was referred, found that David William Hall died intestate, and refused to consider the will of David William Hall as vesting any interest in Annie E. Hall.

Upon the trial of this cause in open court, after objections had been filed to the special commissioner's report before him and had been overruled, and after the date of the report had been changed from February 9, 1901, to February 11, 1901, and after exceptions had been filed to the report and its findings by Annie E. Hall, counsel for Annie E. Hall offered in evidence still another copy of what purported to be a will of David William Hall,

deceased, dated April 10, 1885, and the proceedings alleged to have taken place in the probate court of Hitchcock county, Nebraska, upon the probate thereof, together with a new certificate signed by C. W. Shurtleff, judge of the probate court of said Hitchcock county, dated February 16, 1901. These last proceedings and the copy of the will were the same as those first introduced by counsel for Annie E. Hall, except that there was a new certificate, which certified that said will was duly executed and proven in said probate court of Hitchcock county, agreeably to the laws and usages of the State of Nebraska, and that said certificate was in due form of law, as required by the statutes of the United States and of the State of Nebraska. This last copy of the will and of the proceedings for its probate, and of the certificate attached to it, were never recorded either in the probate or county court of Shelby county, or in the recorder's office of said county.

CUNNINGHAM & BOGGS, and WALTER C. HEADEN, for appellant.

E. A. RICHARDSON, for appellees Silas E. Seeley and Mary Jane Pollock.

CHAFEE & CHEW, and WILLIAM H. CRAIG, for appellee Annie E. Hall.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—The first question, presented by the record in this case, relates to the validity or invalidity of the deed, executed to the appellant, Bliss, on July 3, 1900, and recorded on August 12, 1900, as affected by the will of David William Hall, alleged to have been admitted to probate in Hitchcock county, Nebraska, on March 12, 1900. Upon the assumption that David William Hall died intestate, his heirs were his brothers and sisters named

in the statement preceding this opinion, as he died unmarried and without children; and, by the deed of July 3, 1900, all the interest, which David William Hall had in the premises when he died, except the interests which passed at his death to his brother, Newton W. Hall, and his sister, Mary Jane Hall, was conveyed to the appellant, Bliss. In other words, upon the assumption of intestacy, Bliss obtained by his deed whatever interest in the property, owned by David William Hall at the time of his death, passed to his heirs, except that which was inherited by the brother and sister last above named. If, however, the will of David W. Hall, alleged to have been made in Nebraska, is a valid instrument and is in force as against the deed made to Bliss, then whatever interest David William Hall owned in the land at the time of his death passed to Annie E. Hall, the devisee in his will; and the deed to Bliss conveyed to him none of the interest, which may have been owned by David William Hall when he died.

The material inquiry, therefore, is, whether any interest, that may have been owned by David William Hall at the time of his death, passed by the deed in question to Bliss, or whether the will of David William Hall is so far valid as to make such deed of no effect so far as it attempted to convey such interest.

There is nothing in the alleged will of David William Hall or in the proceedings for its probate in Nebraska, which appeals to our favorable consideration. The will, as presented at one time, purports to bear date on April 10, 1885, and, as presented at another time, purports to bear date on April 10, 1887. David William Hall died in Colorado on or about April 25, 1887. But the will claimed to have been left by him was not presented for probate until the 16th day of February, 1900, nearly thirteen years after the death of David William Hall. No explanation is given of this long delay, or of the whereabouts of the will in the meantime. The proof tends to

show that David William Hall resided in the State of Kansas, and yet the proceedings for the probate of his will were taken in the State of Nebraska. The petition to the county court of Hitchcock county in Nebraska, asking for the probate of the will, was signed and presented by Newton W. Hall, the husband of Annie Hall, who was the sole devisee in the will. Upon the trial of the cause, sections 140, 141, 142 and 143 of the laws of the State of Nebraska, relating to the probate of wills, were introduced in evidence. Said section 141 provides that "if no person shall appear to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all the particulars as required in this chapter, and that the testator was of a sound mind at the time of the execution thereof." Said section 142 provides as follows: "If none of the subscribing witnesses shall reside in this State at the time appointed for proving the will, the court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will, and, as evidence of the execution of the will, may admit proof of the handwriting of the testator, and of the subscribing witnesses."

It appears from the order entered on March 12, 1900, admitting the will to probate, that Newton W. Hall made affidavit that both of the subscribing witnesses to the will who, in their lifetime, had lived in Hitchcock county, Nebraska, were dead; and Newton W. Hall, although the husband of the sole devisee in the will, swore that the signature thereto was the signature of David William Hall. His signature was also sworn to by one other witness, named Edwin Wilson. Wilson and Newton W. Hall swore that David William Hall was of sound mind and memory in the fall of 1885, and also in the fall of 1886, although the will was made before either of those dates,

to-wit, on April 10, 1885. Neither Wilson nor Newton Hall, the only witnesses sworn upon the probate of the will, testified to the handwriting of the subscribing witnesses to the will, nor was there any testimony as to the signatures of the subscribing witnesses.

While the circumstances thus referred to justly subject the will and the proceedings for its probate to suspicion, we are not prepared to say that it should be rejected as a valid will on account of these suspicious circumstances alone. But we are of the opinion for the reason hereinafter stated, that such will should not prevail against the deed made to the appellant, Bliss, so far as such deed purported to convey the interests of the brothers and sisters of David William Hall, and others holding under them, who signed said deed.

Section 9 of the statute of this State in regard to wills provides that "all wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this State, accompanied with a certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved, agreeably to the laws and usages of that State or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this State." (3 Starr & Curt. Ann. Stat.—2d ed.—p. 4040). The words in the last quoted section, "shall be recorded as aforesaid," evidently refer to the recording by the clerk of the county court in a book to be provided by him, as stated in section 2 of the Statute of Wills. (Ibid. p. 4026). Section 9 of the Statute of Wills, as above quoted, is the same as was section 8 in the Revised Statutes of 1845.

On February 14, 1857, an act of the legislature was passed which, with slight changes and additions, appears

now in the Revised Statutes as section 33 of the act in regard to conveyances. Said section 33 of the act in regard to conveyances is as follows: "All original wills duly proved, or copies thereof duly certified, according to law, and exemplifications of the record of foreign wills made in pursuance of the law of Congress in relation to records in foreign States, may be recorded in the same office where deeds and other instruments concerning real estate may be required to be recorded; and the same shall be notice from the date of filing the same for record as in other cases, and certified copies of the record thereof shall be evidenced to the same extent as the certified copies of the record of deeds." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 954). Certainly the following words in section 33, to-wit: "the same shall be notice from the date of filing the same for record as in other cases," were intended to have some meaning. If "exemplifications of the record of foreign wills made in pursuance of the law of Congress in relation to records in foreign States," operate as notice from the date of filing the same for record in the recorder's office of a county in this State, then third persons, acquiring interests in land adverse to the devisees in such wills, cannot be said to have constructive notice of such wills when such exemplifications are not so recorded.

In the case at bar, it is not claimed that the appellant, Bliss, had any actual notice of the existence of the will of David William Hall when he obtained his deed, dated July 3, 1900, and recorded August 12, 1900. There was nothing upon record in the recorder's office of Shelby county, or elsewhere in this State, which would give him constructive notice of the existence of the will of David William Hall when he obtained or recorded his deed. It is true that, on December 17, 1900, what purported to be a certified copy of the will of David William Hall, and of the proceedings for the probate thereof, was recorded in the recorder's office of Shelby county. If the certificate

to the copy, so recorded on December 17, 1900, had been regular and in proper form, the record of it on that day would have been no notice, as the appellant, Bliss, had obtained and recorded his deed theretofore on August 12, 1900. But the record of the copy on December 17, 1900, was no notice, because the certificate attached thereto was not in proper form. Section 9 above quoted provides that the authenticated copy of a foreign will must be accompanied by a certificate that the will was "duly executed and proved, agreeably to the laws and usages of that State or country in which the same was executed." The certificate, attached to the copy recorded on December 17, 1900, did not state that the will of David William Hall was duly executed and proved agreeably to the laws and usages of Nebraska. Its record was, therefore, no notice to the appellant, Bliss. (*Lewis v. Barnhart*, 145 U. S. 79; *Harrison v. Weatherby*, 180 Ill. 418).

This precise question was passed upon by the Supreme Court of the United States in the case of *Lewis v. Barnhart*, *supra*. There, section 9 of the act in regard to wills and section 33 of the act in regard to conveyances are quoted, and the following views are expressed by the Federal Supreme Court, to-wit: "It is clear from these statutes that the will of Romeo Lewis, or an authenticated copy thereof, proven according to the laws of Ohio, if accompanied with a certificate of the proper officers that the will was duly executed and proven agreeably to the laws and usages of that State, could, at any time after it took effect, have been recorded in Illinois, and thereby become good and available in that State in like manner as wills there made and executed; and that, from at least the passage of the act of 1857, it would have become, after the filing of the same for record, and in respect to the real estate devised by it, notice as in the cases of deeds conveying real estate. But it is equally clear that the copy of the testator's will, filed and recorded in 1866 in the office of the recorder of Woodford

county, was not authenticated or certified so as to entitle it to record under the above statutes in Illinois. It was not certified to have been executed and proven according to the laws and usages of the State of Ohio, where it was made. * * * It results that the recording in Illinois in 1866 of what purported to be the will of Romeo Lewis was without legal effect, and was not, in law, notice that the lands in dispute were part of those referred to in that will."

As to the copy of the will dated April 10, 1887, the certificate was defective in the same respect as that attached to the copy of the will dated April 10, 1885; and no copy of the will of 1887 was ever recorded in the county court or recorder's office of Shelby county. Upon the trial, however, of this cause in the court below, the solicitors of Annie E. Hall introduced in evidence an authenticated copy of the will of David William Hall and of the proceedings for the probate thereof in Hitchcock county, Nebraska, accompanied by a certificate which certified that the will was duly executed and proven in said court agreeably to the laws and usages of the State of Nebraska. But this exemplified copy, which bore date February 16, 1901, after the special commissioner to whom the cause had been referred had taken all the testimony in the case and submitted his report, was not recorded at all in the recorder's office of Shelby county, Illinois. It is contended on behalf of Annie Hall, that it was properly admitted in evidence, and established the validity of the will of David William Hall, notwithstanding it had never been recorded. This contention is supposed to receive some support from the cases of *Shephard v. Carriel*, 19 Ill. 313, and *Newman v. Willetts*, 52 id. 98. In the *Shephard* case it appeared that the exemplified copy of the foreign will and the proceedings for its probate therein introduced were filed for record in the county court and in the recorder's office before the act of February 14, 1857, was passed; and that the suit there de-

cided was begun in 1856 before the passage of the latter act. In addition to this, what was said in the *Shephard case*, to the effect that it was immaterial when the papers in question were filed, had reference to the filing of the same in the probate court, and not in the recorder's office, so that, there, the act of February 14, 1857, was not considered or passed upon. In the *Newman case* there was no question as to the effect of the record of a foreign will as against an interest in land acquired by third persons holding adversely to the devisees under the will. The simple question in the *Newman case* was whether Mrs. Newman took an interest in the land in Illinois under a will, made by her deceased husband in Louisiana; but no point was made as to her right to hold that interest as against third persons. Therefore, the *Shephard* and *Newman cases* are not authority for the position, that a foreign will is valid and of effect, as against third persons without actual notice holding land adversely to it in this State, where no exemplified or properly certified copy of such will has been recorded in this State. Such, substantially, was the holding of this court in *Harrison v. Weatherby*, *supra*, and of the Supreme Court of the United States in *Lewis v. Barnhart*, *supra*.

In *Lewis v. Barnhart*, *supra*, the same contention was made as is made here, namely, that a properly authenticated copy of a valid will was effective when introduced in evidence even though not recorded in this State; and, in that case, the Supreme Court of the United States held as follows: "The contention of the plaintiffs is that, even if this will was not properly recorded in Illinois, it was, nevertheless, evidence as to the title to the lands. (*Shephard v. Carriel*, 19 Ill. 313; *Newman v. Willetts*, 52 id. 98; *Safford v. Stubbs*, 117 id. 389). But this view does not meet the question before us as to whether the record of the will in Woodford county, from and after it was made, was itself notice to those who purchased from Mrs. Lewis. A duly certified copy of the will may be competent evi-

dence upon the issue as to paramount title, but it could not operate as constructive notice of its contents from the date of the insufficient record of it made in 1866 in Woodford county."

We are, therefore, of the opinion that the court improperly held that Annie Hall took all the interest of David William Hall in the premises in question under and by virtue of the will made in Nebraska; and that the appellant, Bliss, under his deed, became possessed of all the interest in the land in question formerly owned by David William Hall, except the interests of Newton W. Hall and Mary Jane Hall, afterwards Mary Jane Pollock, who did not sign that deed.

Second—The next question relates to the solicitor's fee allowed to the complainant below, the present appellee, Silas E. Seeley, and taxed as costs against all the parties in the case. We think that this fee was improperly taxed as costs. (*Habberton v. Habberton*, 156 Ill. 444; *Hartwell v. DeVault*, 159 id. 325; *Metheny v. Bohn*, 164 id. 495; *Dunn v. Berkshire*, 175 id. 243; *Gehrke v. Gehrke*, 190 id. 166).

In the first place, there is no evidence, properly presented by the record, as to the value of the services rendered by the solicitor of the complainant below. It is true that a paper is inserted in the record which states that, on the hearing of the cause on March 7, 1901, two attorneys testified that the sum of \$500.00 was a reasonable fee for the services of said solicitor. But there is no evidence upon this subject embodied in the certificate of evidence, nor are there any facts in relation thereto recited in the decree of the court below. In *Davis Paint Co. v. Metzger Oil Co.* 188 Ill. 295, we said (p. 298): "Where, as here, no facts are found in the decree, and there is no certificate of evidence, there is nothing in the record to sustain the decree, and, hence, there is error which requires a reversal of the decree." In *Metheny v. Bohn*, *supra*, we also said (p. 497): "No evidence is preserved in the record showing what services the complainant's so-

licitors rendered or the value of such services. * * *
The rule that the evidence to sustain an allowance of this character must be preserved in the record has been repeatedly stated by this court."

In the second place, the rights and interests of all the parties do not appear to have been correctly set forth in the bill as originally filed; as the bill was demurred to several times, and several times amended, before the allegations in regard to such interests were correctly made. In *Metheny v. Bohn*, *supra*, we held that, under the statute, by which the court is directed to apportion the fees when the rights and interests of the parties are properly set forth in the bill unless some defendant shall interpose a good and substantial defense to the bill or petition, the good and substantial defense which may be interposed, and which will prevent the allowance of the fee, is a defense of a good and substantial character. Speaking of this statute, we there said (p. 501): "We think it should be construed as meaning that a defense, valid and substantial in character, made in good faith and on reasonable ground, should exempt a defendant from paying a solicitor of his adversary, not for services rendered to him, but for a hostile attack upon what he in good faith believes to be his substantial right. If the bill states the rights and interests of the parties correctly, a defense which is merely formal, frivolous or vexatious, or which is not undertaken in good faith, would not be regarded as good or substantial. The defense in this case was of a good and substantial character and was not undertaken without reasonable grounds, although it was overcome by evidence on the part of complainant and proved unsuccessful. In such a case it would not be equitable for the defendant to pay a part of a solicitor's fee solely earned as his adversary."

In the case at bar, the defense based upon the alleged validity of the foreign will, made in Nebraska, was held to be good in the court below, but is here held to be bad.

It was, however, not formal, frivolous or vexatious, but was a defense of a substantial character. The question as to the effect of the foreign will, when set up against the deed executed in Illinois, was a debatable question and not altogether free from doubt. Hence, this is not a case where, under the statute, the solicitor, filing the bill of complaint for partition, can tax his fee as costs against all the parties; but, in view of the considerations already stated, each party should be allowed to pay only his own or her own solicitor's fees.

For the reasons above stated, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

ANNIE MARY TOWNE

v.

CHARLES A. TOWNE *et al.*

Opinion filed October 24, 1901.

191 478
201 874

1. APPEALS AND ERRORS—*amount involved is the amount disposed of by the judgment.* The amount involved on appeal is the amount to be disposed of by the judgment or decree, and not the amount affected by the error assigned.

2. EVIDENCE—*admissibility of the insured's declarations on question of mistake in benefit certificate.* In determining whether a deceased member of a benefit society knew of and acquiesced in a mistake made by the clerk of the society in the names of the beneficiaries when making out a new certificate, the conduct of the deceased in retaining the new certificate without objection is competent evidence; but so, also, are his declarations tending to show that he did not know of the mistake.

3. SAME—*competency of insured's declarations does not depend upon presence of beneficiary.* The competency of declarations by a member of a benefit society tending to show that he did not know that a mistake had been made in the certificate does not depend upon the presence of the beneficiary when such declarations were made.

4. **BENEFIT SOCIETIES**—*right of interested parties to have certificate reformed.* If a member of a benefit society did not read his new certificate and did not know that a mistake had been made therein cutting out the half interest of his heirs and making his wife the sole beneficiary, the right of the heirs to have the certificate reformed after his death is not barred by the mere fact of his retaining possession of the certificate.

Towne v. Towne, 93 Ill. App. 159, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

FRED H. ATWOOD, FRANK B. PEASE, and CHARLES O. LOUCKS, for appellant.

MUIR & HORGAN, for appellees.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

On December 13, 1884, Allan W. Towne obtained a certificate from the Chicago Guaranty Fund Life Society for the sum of \$2000, payable by assessment, at his death, to the appellant, Annie Mary Towne, his wife. On May 12, 1887, said certificate was exchanged by him for another one of the same amount, date and number and with the same beneficiary. The first certificate for which the new one was substituted was surrendered and was marked canceled on said date, May 12, 1887. On April 12, 1892, the second certificate was exchanged for a third one of the same amount, date and number, and said second certificate was canceled and marked "Surrendered for change of beneficiary.—4-12-92." The purpose of this exchange was to make a change in the beneficiary, and for that purpose Allan W. Towne made a written request, dated April 11, 1892, for the new certificate, with beneficiaries as follows: "Payable to Annie Mary Towne, wife, one-half, and one-half to my heirs equally." Afterward the

society re-incorporated, and provided for a change of policies from an assessment to what was called a "natural life policy," and provided for an exchange of old policies for new ones. On August 30, 1898, Allan W. Towne, desiring to make such an exchange, signed an application therefor, setting forth that he was the holder of certificate 932 on the *post mortem* assessment plan and wanted to exchange it for a natural life policy. The application provided, among other things, that the new policy should be for the same amount and with the same beneficiary or beneficiaries as the original certificate. Towne did not deliver his certificate to the society before the new one was made out. A clerk took the papers relating to the risk of Towne, which were in the possession of the society and all pasted together, and filled up the new certificate. He did not notice the letter directing the change in the beneficiary or that such beneficiary had been changed in the original certificate, but followed the first application, and inserted the name of appellant, Annie Mary Towne, as the beneficiary. The clerk mailed the new policy to Towne, with a letter stating that it was enclosed therewith, together with a receipt for the premium, and that he hoped Towne would find the same satisfactory. He added a postscript, as follows: "We enclose stamped addressed envelope and will ask you to return your original certificate for cancellation." Upon the receipt of the new certificate Towne mailed the old one to the society, and it was canceled. He placed the new certificate in a box in a safety deposit vault, where it remained until a short time before his death, when, by his direction, appellant went to the safety deposit vault and got it and retained it until after his death. Towne died April 11, 1899, leaving appellant, his widow, and the appellees, Charles A. Towne, Alvin G. Towne and Katie M. Jones, his children and heirs-at-law. Appellees filed this bill against the society and appellant, praying for a reformation of the certificate so that it might read the same

as the one for which it was exchanged, and be payable one-half to appellant and one-half to appellees, equally. The society paid the money into court and was dismissed from the suit. The court ordered \$1000 paid to Annie Mary Towne and \$300 to Katie M. Jones, and on final hearing a decree was entered that the remaining \$700 be paid to appellees, as follows: "To Charles A. Towne \$333.33, to Alvin G. Towne \$333.33, and to Katie M. Jones \$33.34." The Appellate Court affirmed the decree.

No certificate of importance having been granted by the Appellate Court, appellees have moved to dismiss the appeal on the ground that the amount involved in the suit is less than \$1000. By statute the judgment of the Appellate Court is final in all cases determined therein in actions *ex contractu* when the amount involved is less than \$1000, exclusive of costs. The construction given to this statute is, that the amount involved is the amount to be disposed of by the judgment or decree of the court, and not the amount affected by the error assigned. In this case, the amount brought into court by the society to be disposed of, and which was disposed of, was \$2000. That was the amount involved in the suit in the superior court of Cook county, and this court has jurisdiction of the appeal. (*Longwith v. Riggs*, 123 Ill. 258; *Svanoe v. Jurgens*, 144 id. 507; *Voigt v. Kersten*, 164 id. 314; *MacVeagh & Co. v. Roysten & Co.* 172 id. 515.) The motion to dismiss the appeal is denied.

The object of the last exchange of certificate by Towne was to obtain a new policy for a fixed premium, payable yearly or in quarterly installments, on the natural life plan, under the articles of re-incorporation adopted January 4, 1895. It was to be for the same amount and with the same beneficiaries as the original certificate for which it was exchanged. There was no other certificate in existence than the one which Towne then held, payable one-half to appellant and the other half to appellees, equally. That certificate had been substituted for pre-

vious certificates which had been canceled. The original certificate bore the same date of December 13, 1884, and the same number it had always borne, but had been changed in respect to the beneficiary. The direction that the natural life policy should be for the benefit of the same beneficiaries as the original certificate could only refer to the certificate which was then in force. The society so understood, and sent the new certificate to Towne with the direction to return the original certificate for cancellation. The clerk made a mistake in preparing the certificate, from overlooking the fact that the original certificate had been changed. It is clear that the mistake was made, and the complainants were entitled to have the certificate reformed unless Allan W. Towne knew of the mistake and did not object to the certificate as written.

On that question it is insisted that the evidence showed Towne was aware that the new certificate was made payable to his wife, the defendant, and not payable as the original certificate was. If he had such knowledge and approved of the certificate as issued, a correction could not be made after his death on the ground of mutual mistake. The evidence tending to support this claim is, that Towne was a man of ordinary intelligence and able to read and write; that he received the new certificate September 1, 1898, and deposited it in his box, and retained it until April 11, 1899, without objection. It is also contended that the declarations of Towne during the same period, to other parties, concerning the beneficiaries of the certificate, were incompetent; that the court erred in admitting them, and that they must not be considered. These declarations were testified to as having been made by Towne, and tending to show that he understood the insurance money was to go one-half to his wife and the other half to his children. Of course, such declarations were not competent evidence of the fact that the certificate was made out as he said it was. That

fact was not in question, and if it had been, it could not have been proved by his declarations. The thing in question, however, was the state of his mind and his intention and understanding as to the certificate. The mistake having been made, the court was called upon to decide whether he knew of it or acquiesced in it, and his conduct, demeanor and declarations concerning the certificate were all evidence on that subject. The circumstances proved would tend to raise a presumption that Towne had read the certificate and knew that it was made payable to his wife. If there was such a presumption that he read the certificate and acquiesced in it as written, from the fact of his ability to read and his possession of the certificate, it was equally competent for the complainants to show that he did not, in fact, read it. His behavior in holding the certificate and making no objection, and his declarations as to the contents and nature of it, were both evidence of his understanding and intention in regard to it. The mistake having been made, it would seem probable that if Towne had read the certificate he would have called the society's attention to it and had it corrected. Since it is clear that the mistake was made, the only explanation of Towne's conduct, in view of all the evidence, is that he never noticed it. If he failed to read the certificate and did not know that the mistake had been made, the right of complainants to a reformation would not be barred by his mere possession of the certificate. We are satisfied with the conclusions of the Appellate Court on that subject.

The fact that the declarations of Towne were not made in the presence of his wife, the defendant, is not material. She had no vested right in the certificate and he was the only party in interest in his lifetime. He was the party with whom the contract was made, and her presence or absence was immaterial.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE COUNTY OF CHRISTIAN

v.

LAURENCE MERRIGAN.

Opinion filed October 24, 1901.

1. SHERIFFS—*sheriff's powers not suspended by sending militia to preserve peace.* The sending of troops by the Governor into a county to aid in preserving the peace under the act of 1887, relating to riots, (Laws of 1887, p. 239,) does not suspend the powers and duties of the sheriff nor deprive him of power to appoint deputies to aid in protecting property and preserving the peace.

2. COUNTIES—*liability of county for subsistence of special deputies in riot cases.* Under section 2 of the act of 1887, concerning mobs and riots, the county is liable for the subsistence of each deputy while on duty as such, whether such subsistence is provided for himself at his own home, or elsewhere.

3. PLEADING—*a demurrer does not admit conclusions of law.* A demurrer admits facts which are well pleaded, but not the legal conclusions drawn therefrom by the pleader.

4. WORK AND LABOR—*eight-hour-day law does not apply to deputies appointed to preserve peace.* The act making eight hours a legal day's work applies only to mechanical trades, arts and employments of like character, and not to services of an official character, such as those of deputy sheriffs appointed to aid in preserving the peace.

5. SAME—*extra time cannot be recovered for in absence of agreement.* In the absence of any agreement for an eight-hour day no recovery can be had for extra time.

County of Christian v. Merrigan, 92 Ill. App. 428, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. WILLIAM M. FARMER, Judge, presiding.

E. A. HUMPHREYS, State's Attorney, (JAMES B. RICKS, of counsel,) for appellant.

J. C. & W. B. MCBRIDE, and MILLS BROS., for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Christian county, which the appellee obtained in a suit for

191	484
206	*184
107a	*541

191	484
209	168

compensation for services and subsistence while he was acting as a special deputy sheriff of Christian county in protecting property and preserving the peace during a strike at Pana, in said county, in 1898. The declaration alleged the due appointment of appellee, in writing, by the sheriff, as such deputy; that appellee took the oath of office, as required by the statute, and entered upon the performance of his duties, and served until discharged,—the first count alleging the time of such service to have been one hundred and twenty-four days, and the second count one hundred and fifty days, of eight hours each. Each count alleged that by force of the statute the appellant become liable to pay him two dollars for each day's service. The third count was for reasonable compensation for subsistence, under the statute, during the same period, and alleged that fifty cents a day was such reasonable compensation. The common counts were added. Besides the general issue the defendant filed a special plea, which averred that the Governor of the State, because of riotous conditions, by which the courts and civil authorities were overthrown, had issued his proclamation and thereby declared and established martial law in the district comprising the territory wherein and during the time the services sued for were performed, and that a large military force took possession of said territory, and that thereby the duties and functions of the sheriff as a peace and as an executive officer under the laws of the State were suspended, and particularly his power to appoint appellee as such deputy under the statute, and that his alleged appointment was or became illegal or without lawful authority, and was without any binding force on the county. The trial court sustained a demurrer to this plea. The defendant stood by its plea, and a trial was had on the general issue, resulting in a verdict and judgment for the plaintiff below for \$237.50. The Appellate Court granted a certificate of importance.

It is contended by appellant that the court erred in sustaining the demurrer to the special plea. We are of the opinion that there was no error in this regard. Section 15 of article 2 of the constitution provides that "the military shall be in strict subordination to the civil power." Section 1 of the act to secure the peace and good order of society, to quell riots, etc., in force July 1, 1887, (Hurd's Stat. 1899, p. 613,) provides: "That the sheriff of any county in this State, if in his judgment the preservation of the peace and good order of society shall require it, may summon and enroll any number of special deputies which in his judgment the exigencies of the case require, and such deputies shall be subject to his orders, and shall have all the powers of deputy sheriffs until discharged, or excused from duty by the sheriff." Section 2 provides that the county shall pay for the subsistence of such special deputies while on duty, and all necessary expenses incurred by them in the performance of their duty for which they shall have been summoned. Section 4 is as follows: "The deputy sheriffs appointed under this act shall be paid at the rate of two (\$2) dollars per day for the time actually employed, in and about the duties of such appointment, and the county board shall make provision for such payment." Section 5 provides that whenever the sheriff, with the help of his force of special deputies, is unable to preserve the peace, it shall be his duty to notify the Governor of the facts, and to call upon him for such military force as may be deemed necessary to preserve the peace and execute the law. Section 6 provides, that "whenever the military forces shall be ordered out by the Governor on any application of a civil officer as aforesaid, or otherwise, they shall report to such civil officer as the Governor shall designate and shall act in strict subordination to such civil authority, in preserving the peace, quelling riots, or executing the law." Section 7 authorizes the Governor, in certain cases of riot, tumult, etc., to order such military force as he

may deem necessary to aid the civil authorities in suppressing violence and executing the law.

It sufficiently appears from these provisions that civil authority was not suspended, nor was the power of the sheriff to appoint special deputies to aid him to preserve the peace and protect persons and property, but, on the contrary, the military authority of the State was called on to aid the civil authorities, including the sheriff and his deputies, to suppress riot and to preserve peace and good order. The averment in the plea that the powers, duties and functions of the sheriff as an executive or a peace officer, or to appoint special deputies, and the power of the plaintiff to act as such special deputy, were suspended and no longer in force, is merely the legal conclusion of the pleader, not sustained by the facts pleaded and the laws in force, and is not, therefore, admitted by the demurrer. Facts well pleaded are admitted, but not the legal conclusions drawn from them by the pleader.

It is also insisted that the court erred in its instructions to the jury, by virtue of which, and the evidence adduced, the plaintiff was permitted to recover for his subsistence at the rate of fifty cents per day during the time he was on duty as special deputy. The point made is, that only the expenses of subsistence of the sheriff's force of deputies while on duty, and which he was required to provide for, could be charged against the county, and not the value of meals of a deputy provided for himself or eaten at his own table. The point made by counsel is not without force, but we are of the opinion, from the wording of the statute, the county was properly chargeable with the reasonable price and value of the subsistence of each deputy while on duty as such, whether such subsistence was provided for himself at his own home, or elsewhere. The statute declares, in plain terms, that the county shall pay for the subsistence of such special deputies while on duty. We would not be authorized to qualify the words of the statute by an exception or

limitation not expressed or fairly implied from the language used.

Appellee has assigned cross-errors, and contends that the act making eight hours a legal day's work (Hurd's Stat. 1899, p. 840,) applies, and that he should have been permitted to recover, under the second count, for one hundred and fifty days of eight hours each; that is, that the plaintiff should have been permitted to divide the days into periods of eight hours when he was engaged in his duties as deputy, and thus permitted to recover, under the statute, for as many days as there were periods of eight hours' actual service. This point was also correctly decided below. We agree with the Appellate Court in its holding that the statute has no application to cases of this kind, (*Phillips v. Christian County*, 87 Ill. App. 481,) but that it is confined to mechanical trades, arts and employments, and other cases of labor and services of like character, and does not embrace services of an official character. Moreover, if the eight hour statute applied, appellee performed the services required of him each day without any agreement (even if there could be such agreement in such a case) that he should be paid for extra time. In the absence of such an agreement or contract no recovery could be had for extra time employed over eight hours during the same day. (10 Am. & Eng. Ency. of Law,—2d ed.—463; *Lusk v. Hotchkiss*, 37 Conn. 219.) We are of the opinion that the *per diem* required by the statute to be paid for the time actually employed was only for one day in each twenty-four hours.

It follows that the errors complained of were not well assigned.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Mr. JUSTICE RICKS, having been of counsel in this case below, took no part in its decision here.

THE ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

v.

JAMES DUFFY.

191	489
202	680

191	489
112a	540

Opinion filed October 24, 1901.

1. **RAILROADS**—*right of teamster to attempt to save property.* A teamster having a break-down on a railroad crossing has a right to try to get his team and wagon off the track if the circumstances are such as to justify a reasonable belief that he can do so with safety.

2. **SAME**—*what evidence tends to show wantonness in the management of train.* Evidence that a train was going at a high rate of speed around a sharp curve, where the view was obstructed, approaching a much traveled street, giving no warning by bell or whistle, tends to establish wantonness in the management of the train.

Elgin, Joliet and Eastern Ry. Co. v. Duffy, 93 Ill. App. 463, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the Second District, affirming a judgment for \$5000 rendered in an action on the case brought by James Duffy against the appellant, in the circuit court of Kane county, to recover damages for the loss of his arm. The accident was occasioned by a collision of the appellant's train with the wagon of appellee at a street crossing in the city of Aurora.

The declaration contained nine counts, which, in substance, charged the appellant with negligence in not planking the entire width of the street at the crossing; in running its train at a higher rate of speed than the limit fixed by the ordinance of the city; in permitting a freight car to remain upon the crossing at or near the middle of the street, causing plaintiff to drive off of the beaten track at the crossing; in not ringing the bell or sounding the whistle at the crossing, as required by statute; in running the train at a high rate of speed at a dan-

gerous crossing; in failing to use sufficient care in coming upon the crossing, which was obscured by buildings, embankments and trees, and the approach to which was sharply curved. It is also charged that the servants of the company willfully and maliciously inflicted the injury in question.

Railroad street, where the accident occurred, at the crossing in question runs nearly north-east and south-west, and appellant's main line crosses it almost at right angles. The main line of the Chicago, Burlington and Quincy railroad runs parallel with Railroad street and about two hundred feet west of it. Connecting the main lines of the two roads is a "Y" track, which crosses Railroad street on quite a sharp curve. North of the "Y" track is what is known as the "Esser switch," which branches off from the "Y" track a short distance west of Railroad street and extends south, paralleling the "Y" and also crossing Railroad street. Where the "Y" and the Esser switch cross Railroad street they are six or eight feet apart, and are provided with plank crossings in the middle of the street, about sixteen feet wide. Appellee was engaged in hauling railroad ties from a car on the Esser switch. The ties were unloaded on the north side of the switch, and there were several cars on that track, one of them extending from two to four feet on the plank crossing. On account of an embankment north of the track it was necessary for appellee to drive close to the north side of the cars as he went to Railroad street. At the time of the accident appellee had loaded his wagon and had driven around the end of the car in the street. In going round the end of the car the turn was short and he drove off of the planking on the opposite side of the street. There is a sharp decline from the Esser track to the "Y" track, and when the wagon wheel struck the second rail of the latter track a portion of the load slipped off on the track and between the wheels in such a manner that he could not drive on. A man named Hord was with

Duffy on the load at the time and they both slipped off the ties to the ground. Three men who were engaged in assisting to unload the ties from the cars came to appellee's assistance and started to re-place them upon the wagon. Hord, at the request of a watchman near by and with the knowledge of Duffy, went north on the "Y" track to flag a train which was expected about that time. When a few of the ties had been loaded the train was seen by Hord coming down the track toward the crossing. He made signals for the purpose of stopping it, but failed, though its speed was somewhat slackened. Sullivan, one of the men engaged in putting the ties back on the wagon, saw the train coming and at once gave the alarm to Duffy, who was on the wagon, to "jump quick." It appears he started to jump down, but the horses at that time gave a jerk which threw him upon his knees. Before he could get off, the engine had struck the wagon, throwing him high into the air, and he landed about forty-five feet from where the wagon had stood. The horses were thrown into a ditch and the wagon was broken in two, parts of it going on either side of the track. Appellee was found on the north side of the track with some ties and the hind axle of the wagon over him. His right arm was cut off and he was otherwise injured.

A. J. HOPKINS, F. G. HANCHETT, FRED A. DOLPH, and R. B. SCOTT, (W. DUFF HAYNIE, of counsel,) for appellant.

W. J. TYERS, and ALSCHULER & MURPHY, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

Counsel for appellant insist there was no evidence tending to show that appellee was in the exercise of ordinary care for his own safety, and that the trial court erred, for that reason, in refusing to give a peremptory instruction to find for the defendant. The theory upon

which counsel asked the instruction was, that appellee, in remaining upon the track for the purpose of saving his team, voluntarily exposed himself to danger merely to protect his property, and his act amounted to negligence *per se*. Although the law will not justify a party in exposing himself to personal danger in order to protect his property, appellee had the right to try to get his wagon off the railroad track if the circumstances were such as to justify a reasonable belief that he could do so with safety. The fact that Hord had gone up the track, around the curve, to flag any train which might be approaching, was calculated to lead him to think it would be stopped and that he would have time to save his team and wagon. He also had the right to assume that the train would not approach at a dangerous rate of speed and without warning. Under the circumstances as they appear from the record we cannot say the jury could only draw one inference (that of negligence) from his act, and therefore it was negligence *per se*. On the contrary, to say the least, a different conclusion might reasonably be drawn by different minds, and such being the case, it was a question to be submitted to the jury. *Illinois Central Railroad Co. v. Anderson*, 184 Ill. 294.

Moreover, the declaration charges the defendant with willfully and maliciously inflicting the injury. If the record discloses any evidence tending to support that averment, negligence on the part of the appellee, if conceded, would not excuse the appellant. (*Lake Shore and Michigan Southern Railway Co. v. Bodemer*, 139 Ill. 596.) The evidence tends to prove that the train was going at a high rate of speed around a sharp curve, where the view was obstructed by an embankment, approaching a street which was much traveled, giving no warning by the ringing of the bell or sounding the whistle; and this testimony, without passing upon its weight or whether it was overcome by other evidence, tended to prove the charge of willfulness and wantonness in the management of the

train. The jury might well have based its verdict upon that theory of the case. All controverted questions of fact must be treated as settled adversely to appellant.

Complaint is made that the trial court refused to give two instructions for the appellant with reference to the "proximate cause" of the injury. They were both misleading, in that they singled out one fact and asked the court to tell the jury that it could not be regarded as the proximate cause, while such fact was really only one of a series of facts which together might have been the proximate cause. Even had they set forth the law correctly they were properly refused, because that branch of the cause was clearly set forth in other instructions given. Twenty-seven instructions were given on behalf of defendant, many of which are, to say the least, most favorable to it and which cover every phase of the case.

We find no prejudicial error in the record. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ROBERT MCGAHAN *et al.*

v.

THE PEOPLE *ex rel.* Charles S. Deneen, State's Attorney.

Opinion filed October 24, 1901.

1. QUO WARRANTO—*when information should not be deemed a private suit.* If an information in the nature of *quo warranto* to test the legality of village organization is signed by the State's attorney, and purports to have been filed by him on behalf of the People, the fact that the people of the community affected employed counsel to assist in the prosecution does not require the dismissal of the information as having been brought by private parties.

2. SAME—*in quo warranto the burden of proof is upon the respondents.* Where the question on information in the nature of *quo warranto* is whether the territory organized into a village contained the requisite number of inhabitants, the burden is upon the respondents to prove the affirmative, and the People are not required, in the first instance, to prove anything.

191	498
200	86
191	498
205	1487

APPEAL from the Circuit Court of Cook county; the Hon. JOHN C. GARVER, Judge, presiding.

WHELOCK & SHATTUCK, for appellants.

CHARLES S. DENEEN, State's Attorney, and GREGORY, POPPENHUSEN & McNAB, (CONRAD H. POPPENHUSEN, of counsel,) for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an information in the nature of a *quo warranto*, filed December 15, 1898, by the State's attorney of Cook county, in the circuit court, against Robert McGahan, Moses Doyle, George Airey, John Burke, Cyrus Michelson, John Aggen and Martin Simon, charging that they held and do now hold and execute, without authority of law, the offices and corporate name of president and board of trustees of the pretended village of Mt. Greenwood, and that they unlawfully assume, as such president and board of trustees, without grant or charter, to be a body politic and corporate by the name of "Village of Mt. Greenwood," and to exercise the powers granted by the act for the incorporation of cities and villages, and calling upon them, said respondents, to answer and show by what authority they assume to hold and execute said offices and to assume such corporate name. The respondents filed a plea, in which they averred that in pursuance of the provisions of the act for the incorporation of cities and villages thirty legal voters resident within certain territory (describing it) within the township of Worth, in Cook county, not exceeding two square miles and not included in any incorporated town, city or village, and having a population of three hundred inhabitants and upwards, did on the 29th day of July, 1898, present to the county judge of said county a petition to cause to be submitted to the legal voters of such territory the question whether or not they would organize as a village under said act. The plea then averred the

calling of the election to be held on the first day of September, 1898, the holding of the election, and that the majority of the votes cast thereat were found, on the count and canvass thereof, to be in favor of said organization, and that said respondents were at said election duly elected trustees of said village and said respondent McGahan was duly elected president of said village; that they took the oath of office prescribed by the statute and thereupon entered upon the discharge of their official duties. The plea set up the various proceedings required by sections 5, 6, 7 and 8 of article 11 of the act for the incorporation of cities and villages. (Hurd's Stat. 1899, p. 289.) Replication was filed, a jury was waived and the cause went to trial before the judge of said court, and on November 10, 1900, a judgment of ouster was rendered against them and the said village, ousting them of their said offices and the village of its assumed corporate powers and franchises.

A motion was made by the respondents to dismiss the information, because, as it was insisted, it was filed by private parties, and not by the Attorney General or State's attorney. The information is signed by the State's attorney, and purports to have been brought and filed by him on behalf and in the name and by the authority of the People of the State, and no sufficient proof was made that the proceeding was different from what it purported to be,—that is, one begun in good faith by a public officer on behalf of the People. The interests involved were public, and the mere fact that the people of the community affected became interested and employed counsel to assist in the prosecution does not bring the case within the class condemned by this court in *People v. North Chicago Railway Co.* 88 Ill. 537. As said in that case, "the court below, in the exercise of its discretion, was authorized to take into consideration the circumstances showing the character of the proceedings." We find no cause to disturb the finding of the court below on this question.

The real question tried and on which the case depended was, whether the territory organized as a village contained at the time three hundred inhabitants, and the burden was on the respondents to prove that it did. The People were not required, in the first instance, to prove anything. (*Kamp v. People ex rel.* 141 Ill. 9; *People ex rel. v. City of Peoria*, 166 id. 517.) The evidence tended to prove that certain persons desiring to obtain licenses to keep saloons, and for that purpose to cause a village to be incorporated, caused an enumeration to be made by one Ketcham, and reported the number of inhabitants in the territory to be so organized to be three hundred and twenty. It is clear from the evidence that this enumeration was fraudulent and that the territory did not contain as many as three hundred inhabitants. Ketcham did not see all the people whose names he took, but took the number in each family as they were given to him by some member of the family. He testified that one Cunningham reported fifty-eight names as members of his family residing in the territory to be incorporated; one Flynn, sixty-five; one Galvin, forty-three; one McElligott, twenty-three; and the respondent McGahan, forty. These men kept saloons and boarding houses in the territory, but it appears that the greater number of the persons so reported by them as residents did not and never did reside there. On the whole proof it appeared that said territory contained less than three hundred inhabitants and that the village was illegally organized.

Complaint is made that the court below erred in admitting in evidence, over the objection of respondents, a school census taken of the inhabitants of the territory. It is unnecessary to consider this question, inasmuch as, independently of this enumeration, the respondents failed to prove that the territory in question contained the required number of inhabitants.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

THE PEOPLE, for use of Ellen L. Brooks *et al.*

v.

RICHARD S. PETRIE *et al.*

Opinion filed October 24, 1901.

1. **EXECUTORS AND ADMINISTRATORS**—*executor's bondsmen not liable for default other than as executor.* If an executor does not originally receive or subsequently hold money as executor, but receives and holds it individually or as trustee for the widow and heirs, the sureties on his bond as executor are not liable in case of his conversion of the money to his own use.

2. **SAME**—*when proceeds of insurance certificate are received by executor as trustee.* If the contract of a benefit society with a member is to pay the proceeds of the certificate "as a benefit to his devisees, as provided in his last will," and by such last will the proceeds of the certificate are bequeathed to a named person "in trust for my legal heirs," then the person so named takes the proceeds of the certificate as trustee, even though he is also named by the testator as executor and qualifies as such.

3. **SAME**—*a mere charge by executor against himself does not create a liability against bondsmen.* That an executor and trustee mentions a trust fund in his petition for appointment and in his inventory as being a part of the property of the estate, does not create a liability against the sureties on his bond as executor if they are not otherwise liable under the law.

People, for use, etc. v. Petrie, 94 Ill. App. 652, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Mercer county; the Hon. W. H. GEST, Judge, presiding.

This is an action of debt, (debt \$10,000.00; damages \$10,000.00) begun on March 23, 1899, by the People suing for the use of Ellen L. Brooks, widow, and Elmer O. Brooks, Fannie J. Brooks, Frank S. Brooks, Clarence E. Brooks, Genevra Brooks, Rolla W. Brooks and Eunice E. Brooks, children of one Benjamin F. Brooks, deceased, against the appellees, Richard S. Petrie and Cornelius L. Petrie, sureties upon a bond executed in his lifetime

by one Alexander P. Petrie, now deceased, as executor of the estate of the said Benjamin F. Brooks, deceased. A part of the declaration was demurred to, and the demurrer was overruled by the court. The defendants below filed four pleas, to three of which plaintiffs below filed *similiters*; and to the fourth filed a replication, to which there was joinder by the defendants. The cause was tried by agreement of parties before the court without a jury. The plaintiffs below, appellants here, submitted to the trial court six propositions, to be held as law in the decision of the case, all of which were refused by the court. The defendants below submitted six propositions, to be held as law in the decision of the case, all of which were so held by the court. To this action of the court exception was taken by plaintiff. A motion for new trial was made and overruled. Thereupon, judgment was entered against the plaintiff below and in favor of the defendants, to which exception was taken by the plaintiffs. An appeal was taken from the judgment, so entered upon the findings of the trial court, to the Appellate Court, and there said judgment has been affirmed. The present appeal is prosecuted from the judgment of affirmance, so entered by the Appellate Court.

The declaration alleges that, at the November term, 1886, of the county court of Mercer county, to-wit, on November 28, 1886, Alexander P. Petrie was appointed executor of the will of Benjamin F. Brooks, deceased, and qualified as such executor, and letters testamentary were then and there issued to him; that Alexander P. Petrie entered into bond, with the appellees Richard S. Petrie and Cornelius L. Petrie as sureties, in double the value of the estate; that they thereby bound themselves in the penal sum of \$10,000.00 to be paid to the People. The declaration then proceeds to state the terms of the bond and its condition, as set forth in section 7 of the "Act in regard to the administration of estates." (1 Starr & Cur. Ann. Stat.—2d ed.—p. 271).

The declaration alleges, that Alexander P. Petrie took upon himself the execution of the will and the administration of the estate, and continued to be executor until he died on December 5, 1898; the declaration then alleges, that he did not faithfully discharge the duties of the office of executor according to the conditions of the bond, and neglected and refused to do so to the injury of said widow and children. The declaration then sets forth a copy of the will of Benjamin F. Brooks, deceased, dated August 18, 1886. It also sets forth a copy of a certificate of life insurance in the Covenant Mutual Benefit Association of Galesburg, dated September 12, 1877, and issued to the said Benjamin F. Brooks, together with the conditions and agreements upon which the certificate was issued, and the instructions to the certificate holder. The declaration also sets forth a certain receipt, dated Galesburg, February 11, 1887, signed by A. P. Petrie, acknowledging the receipt by him from said benefit association of said sum of \$5000.00 in full of all claims under said certificate of membership on the life of the late Benjamin F. Brooks. The declaration further alleges that, on November 24, 1886, A. P. Petrie made, and on November 28, 1886, filed in said county court his inventory as executor of said estate, in which said inventory no real estate is described, but said certificate for \$5000.00 is described.

The declaration further avers that, on February 11, 1887, A. P. Petrie, as executor, received from said benefit association, on the policy of life insurance mentioned in the will, said sum of \$5000.00, and receipted for the same; that said Petrie did not pay the several legacies and bequests named in the will, or any part thereof, to the plaintiffs, nor to any one of them, but wasted said money and effects and converted and disposed of the same to his own use; that, on December 5, 1898, the said A. P. Petrie died intestate and insolvent, leaving no estate, real, personal or mixed.

The plaintiffs aver in their declaration, that A. P. Petrie never at any time settled or adjusted his accounts as executor in the said county court, or in any other court, and never made application for discharge as such executor, and that he never was discharged as such executor; that he never at any time filed a bond, or qualified, as trustee under the will, and never turned over the funds in his hands as executor to himself as trustee; that, until the time of his death, the said sums were in his hands as executor, and not in the capacity of trustee; that he has never accounted for the same, as executor, and never in any way charged himself with the same, as trustee.

The declaration assigns, as a further breach of the condition of the bond, that A. P. Petrie did not make and render a fair and just account of his actings and doings as executor to the county court, but failed and refused so to do, whereby said writing obligatory has become forfeited, etc.

The first plea of the defendants below alleged, that the said A. P. Petrie did make and render a fair and just account of his doings as executor. The second plea alleged, that, as to the first breach assigned in the declaration, said Petrie did not have or hold said moneys as executor at the time of his death, nor at any other time. The third plea averred that said Petrie did not receive said moneys, as executor, from the said benefit association in manner and form as alleged in the declaration. The fourth plea averred that the said Petrie in his lifetime paid to Ellen L. Brooks a large sum of money, to-wit, \$5000.00, which exceeded the interest received for said money, in full discharge of all the interest received upon the same.

Said benefit certificate, or certificate of membership, after reciting that the Covenant Mutual Benefit Association of Illinois issues the certificate, and constitutes Benjamin F. Brooks a member of said association, provides

as follows: "And the sum so collected on such assessments * * * the association hereby agrees well and truly to pay or cause to be paid as a benefit to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heirs or devisees of the certificate holder, at the principal office of the association, in the city of Galesburg, Illinois, within ninety days from the date of the acceptance of said evidence of death, any assessments or other indebtedness of the certificate holder to the association being first deducted therefrom, but in no case shall the payment under this certificate exceed \$5000.00," etc.

The second clause of the will provided that at the death of the widow, or in case of her death before the youngest child became twenty years of age, then when the youngest child then living should have attained the age of twenty years, the whole of his estate, after making a certain deduction, should be divided between his sons and daughters (naming them) share and share alike. The third clause of the will of Benjamin F. Brooks, deceased, is as follows: "I give and bequeath to A. P. Petrie in trust for my legal heirs before named the proceeds of one certificate of life insurance in the Covenant Mutual Benefit Association of Galesburg, State of Illinois, numbered 620, for the sum of five thousand dollars (\$5000.00) which I have had made payable to said A. P. Petrie to be disposed of as follows, to-wit: The principal to be kept at interest until the death of my wife, Ellen L. Brooks, or until my youngest child then living shall have attained the age of twenty (20) years should the death of my wife occur before the said child shall have attained that age, at the rate of eight per cent per annum, the interest or income to be paid to my wife, Ellen L. Brooks, quarterly, and I further direct that the said A. P. Petrie sell my tools, shop and all my estate of every name and nature whatsoever, and pay the amount over to my wife, Ellen L. Brooks." The fourth clause of the will appoints A. P.

Petrie guardian of the minor children. The last clause of the will appoints A. P. Petrie to be the executor of the will.

The plaintiffs below introduced in evidence the petition of A. P. Petrie, dated and filed in the county court on November 13, 1886, addressed to the judge of said court, alleging that B. F. Brooks died testate on October 20, 1886, and presenting his will for probate, and further alleging that the testator by his will appointed the petitioner executor; that said petitioner is willing to accept the office and trust confided to him, and containing the following averment, to-wit: "This petition further shows that the said B. F. Brooks died seized and possessed of and personal estate, consisting chiefly of an insurance policy amounting to \$5000.00, all of said personal estate being estimated to be worth about \$5000.00;" and praying that the will be admitted to probate, and that letters testamentary be issued to the petitioner. The plaintiffs below also introduced in evidence the executor's bond and oath in the form specified in sections 6 and 7 of said act. (1 Starr & Curt. Ann. Stat.—2d ed.—p. 271). The plaintiffs also introduced in evidence the inventory filed by the executor, as above set forth, and also the appraisal bill, showing that the widow, Ellen L. Brooks, was allowed \$833.00, and that the articles of personal property amounted to \$327.00, which appraisal bill was dated December 18, 1886. They also introduced said receipt for \$5000.00, and proved that the testator died on October 20, 1886, and that A. P. Petrie died on December 5, 1898. They also introduced in evidence the widow's selection of property on the award, dated December 20, 1886, and her receipt for the same, being all the property inventoried and appraised excepting the certificate of insurance, and amounting to the sum of \$327.00. The plaintiffs also introduced in evidence eighteen receipts signed by the widow, Ellen L. Brooks, executed to A. P. Petrie, and showing that the latter made yearly payments to her

of the interest accruing upon the \$5000.00 in his hands up to November 18, 1891. It was also proven that, after November 18, 1891, said Petrie paid to Mrs. Brooks, at various times, the total sum of \$1452.52 as interest upon the funds in his hands, taking no receipts therefor.

JAMES M. BROCK, and W. J. GRAHAM, for appellants:

Where an executor is also appointed trustee in the will, but gives bond only as executor, he is chargeable in that capacity for the property in his hands until he has given bond as trustee and charged himself with the property as trustee *Prior v. Talbot*, 10 Cush. 1.

When one is both executor and trustee under a will, his responsibility, and that of his sureties, as executor does not cease until he is discharged as executor and qualifies as trustee, or until there is some open and notorious act which would change the capacity in which he acts. *In re Higgins' Estate*, 28 L. R. A. 116; *Cranson v. Wilsey*, 39 N. W. Rep. 9; *Wilson v. Wilson*, 17 Ohio St. 151; *Cluff v. Day*, 124 N. Y. 195; *Newcomb v. Williams*, 50 Mass. 525; *Hall v. Cushing*, 9 Pick. 395; *White v. Ditson*, 140 Mass. 351; *Miller v. Congdon*, 14 Gray, 114; *Sheffield v. Parker*, 33 N. E. Rep. 501.

Money arising from an insurance policy is assets of the estate. *Harding v. Littledale*, 150 Mass. 100; *Webb v. Roetinger*, 12 Ohio C. C. 730; *Kelly v. Mann*, 10 N. W. Rep. 211; *Insurance Co. v. Stevens*, 19 Fed. Rep. 671.

The executor of a testator is the proper person to receive money due on a policy of insurance on a testator's life, payable subject to the will of the insured. *Winterhalter v. Guaranty Ass.* 17 Pac. Rep. 1.

The bond of an executor covers all funds received under color of his official authority. *Clark v. Fredenberg*, 5 N. W. Rep. 306; *Musick v. Beebe*, 17 Kan. 47.

Where, by a will, certain trusts are vested in the executors as such, an executor, by accepting the office and qualifying, accepts the trust so conferred. (*Earle v. Earle*,

93 N. Y. 104.) And having so accepted, his sureties as executor are bound for the execution thereof. *Woodburn v. Woodburn*, 123 Ill. 608; *Nevitt v. Woodburn*, 56 Ill. App. 347.

GUY C. SCOTT, and BASSETT & BASSETT, for appellees:

If a testator in his will appoints his executor to be a trustee, it is as if different persons had been appointed to each office. A court of equity cannot remove him from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors. 2 Woerner on Executors, 721; 1 Perry on Trusts, sec. 281; Schouler on Executors, secs. 247-472.

Where the same person is executor and guardian, or executor and trustee, the money coming to him as executor will be presumed to have been paid to his account as guardian or trustee. After the lapse of a considerable period (after funds coming to his hands as executor) the presumption may fairly be that the estate has been fully administered by the executor, and accordingly that the funds are held by him in the new character as trustee. Schouler on Executors, sec. 247; 1 Woerner on Administrators, 391; *Jennings v. Davis*, 5 Dana, 127.

The inventory of the policy of insurance, or any other act by the executor, could not make the sureties liable. *People v. Huffman*, 182 Ill. 405; *Shields v. Smith*, 8 Bush. 601; *Clay v. Hart*, 7 Dana, 1.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This suit is brought for the purpose of holding the appellees, Richard S. Petrie and Cornelius L. Petrie, liable as sureties upon the executor's bond of Alexander P. Petrie, deceased, for the \$5000.00 paid to said Alexander P. Petrie on February 11, 1887, by the Covenant Mutual Benefit Association of Illinois upon the insurance certificate, described in the statement preceding this opinion.

The liability or non-liability of appellees, as such sureties, depends upon the solution of the question, whether or not the executor, Alexander P. Petrie, received the sum of \$5000.00, being the amount of the insurance certificate, as executor, and held it in his hands as executor up to the date of his death on December 5, 1898. If Alexander P. Petrie did not originally receive or subsequently hold said money as executor, but received it as an individual, or as trustee for the widow and heirs of Benjamin F. Brooks, deceased, then the sureties on his executor's bond would not be liable, as their contract, evidenced by their bond, was for his performance of his duty as executor, and not otherwise.

First—The first question in the case, then, is this: Were the proceeds of the benefit certificate, paid to Alexander P. Petrie, and amounting to \$5000.00, assets of the estate of Benjamin F. Brooks, or not? The general rule is, that the proceeds of such a certificate are not assets of the estate.

"Moneys received on a certificate of membership in a mutual benefit association, the constitution and by-laws of which provide for insurance for the benefit of the member's family, or for such persons as the member may designate, go, on the death of the member, to his family, or the person designated by him, and are not assets subject to the payment of his debts." (11 Am. & Eng. Ency. of Law,—2d ed.—p. 847, and cases in note 1). Elsewhere in the same encyclopedia (vol. 3, p. 1108) it is said: "The right to receive benefits becomes vested in the legally designated beneficiary immediately upon the death of the member while in good standing, and the amount apportioned from the fund should be paid direct to such beneficiary, not to the executor or administrator of deceased."

In addition to the fact that the money, realized upon these benefit certificates, is for the benefit of the certificate holder's family, or heirs, or devisees, or those dependent upon him, the rule, that the proceeds of such a

certificate are not assets of the estate of the deceased certificate holder, rests upon the further fact, that the proceeds of the certificate are not his property at the time of his death. An executor or administrator takes, and administers upon, the estate owned by the testate or intestate as it existed at the time of his death. The certificate holder is not entitled to realize the amount due upon the certificate while he is alive. Only the beneficiary named in the certificate takes the money, and this can only be after the death of the certificate holder.

Moreover, the contract of the benefit association or insurance company is to pay the money, due upon the certificate, to the beneficiary designated upon the face of the certificate. The contract is to pay to the person so designated, and not to pay to the estate or representatives of the certificate holder, unless the latter are specially designated by the certificate itself as the persons entitled to take the money.

A person in his lifetime took out a policy of insurance payable to his "heirs and assigns;" he died intestate, unmarried and childless, and leaving, as his heirs-at-law, a sister, two nieces and a nephew; a question arose as to whether his creditors or his heirs-at-law should have the fund derived from the policy; and it was held that the heirs were entitled to the proceeds of the policy; and it was further held, in regard to the meaning of the word, "heirs," that reference was had to the statute simply for the purpose of ascertaining who were the beneficiaries of the policy, but that, when they were thus ascertained, their right to the money was derived, not from the statute, but solely from the contract embraced in the policy; that is to say, that the next of kin of the deceased were entitled to take the proceeds of the policy by virtue of the contract he had made in their behalf with the insurance company; and, in so holding, the following language was used: "In other words, they take the proceeds, not as heirs or distributees of the deceased, but as purchas-

ers. This being so, the proceeds of this policy were not, under the facts of this case, any part of the estate of the assured, and, therefore, not subject to the claims of his creditors." (*Hubbard, Price & Co. v. Turner*, 93 Ga. 752; *Hubbard v. Turner*, 30 L. R. A. 593, and cases in note).

In the case at bar, the benefit certificate or life insurance policy provides as follows: "The association hereby agrees well and truly to pay or cause to be paid as a benefit to his devisees, as provided in last will and testament, or, in the event of their prior death, to the legal heirs or devisees of the certificate holder," etc. There is no contention here, that the devisees named in the will of Benjamin F. Brooks died, and, therefore, the words, "or, in the event of their prior death, to the legal heirs or devisees of the certificate holder," may be considered as eliminated. By the terms of the certificate, the association agrees "to pay or cause to be paid as a benefit to his devisees, as provided in last will and testament." The contract between the association and Benjamin F. Brooks was for a payment "to his devisees as provided in last will and testament," and not to his executors. The contract was made directly for the benefit of his devisees. We turn, therefore, to his will to learn who are his devisees, as provided therein. The third clause of the will says: "I give and bequeath to A. P. Petrie, in trust for my legal heirs before named, the proceeds of one certificate of life insurance in the Covenant Mutual Benefit Association of Galesburg, State of Illinois, numbered 620, for the sum of five thousand dollars (\$5000.00), which I have had made payable to said A. P. Petrie, to be disposed of as follows, to-wit," etc. The contract, therefore, of the association was to pay the money to A. P. Petrie in trust for the legal heirs of Benjamin F. Brooks, as named in his will. In the third clause of his will he expressly states, that he had made the certificate payable to said A. P. Petrie to be disposed of in a certain way, and thereby himself designated A. P. Petrie,

trustee, as the devisee intended by the language of the insurance certificate. As in the case of *Hubbard v. Turner*, *supra*, the statute may be referred to to ascertain who the heirs are when the certificate is for the benefit of "heirs," so the will may be referred to for the purpose of ascertaining who the devisees are when the certificate is made out for the benefit of devisees, as the beneficiaries. In neither case, however, is the right to the money derived from the statute or the will, but solely from the contract embodied in the policy.

The foregoing views are sustained by the following authorities: *Alexander v. Northwestern Masonic Aid Ass.* 126 Ill. 558; *Covenant Mutual Benefit Ass. v. Sears*, 114 id. 108; *Covenant Mutual Benefit Ass. v. Hoffman*, 110 id. 603; *Gauch v. St. Louis Mutual Life Ins. Co.* 88 id. 251; *Worley v. Northwestern Masonic Aid Ass.* 10 Fed. Rep. 227; *Smith v. Covenant Mutual Benefit Ass.* 24 id. 685.

In *Benefit Ass. v. Sears*, *supra*, the language of the benefit certificate was the same as that in the case at bar, that is to say, the association there agreed "to pay or cause to be paid as a benefit to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate holder;" and it was there held that the promise was, in substance, to pay his devisees, if there should be devisees to take, and if not, then to pay to his heirs.

In *Alexander v. Northwestern Masonic Aid Ass.* *supra*, a certificate of life insurance in a benevolent society was taken payable to the "devisees or heirs-at-law" of the certificate holder, and it was there said (p. 561): "It is not claimed, as we understand the argument, by either side, that the fund is assets belonging to the estate of the deceased, which would pass to the administrators to be used by them in the payment of debts and in the settlement of the estate, but it is conceded that the fund should be paid to the person or persons named in the certificates.

* * * If Alexander had executed a will, and therein

devised the fund to a person or persons therein named, such person or persons, beyond all doubt, would have been entitled to the fund."

In *Worley v. Northwestern Masonic Aid Ass. supra*, it was held that a policy, or certificate of a corporation incorporated for benevolent purposes, under the provisions of State statutes, by the terms of which the corporation agreed to pay to the devisees of the deceased a sum of money within a certain number of days after receiving evidence of his death, was not a part of the estate of the deceased, nor recoverable as such by his administrator.

There is a class of cases, some of which are referred to by counsel for the appellants, which seem to hold the contrary of this view; but it will be found that, in such cases, the language used in the certificate indicated an intention on the part of the deceased certificate holder, that the proceeds of the certificate should be a part of his estate, and should go to his administrator or executor for the payment of debts. Thus, in *People v. Phelps*, 78 Ill. 147, the policy by its express terms was payable to the party's "legal representatives;" and it was there held that the proceeds of the certificate would be assets in the hands of the executor or administrator and subject to the payment of debts, because the words "legal representatives," in the commonly accepted sense, meant administrators or executors. (*Warnecke v. Lemba*, 71 Ill. 91). The cases referred to by counsel for appellants are clearly distinguishable from the case at bar. In *Harding v. Littledale*, 150 Mass. 100, it was held that the proceeds of a benefit certificate, after the death of a member, would go to his executor or administrator as a part of his estate; but there, under a special statute, a benefit association might insure a member for his own benefit; and, of course, in such case, when he died, the proceeds of the certificate would belong to his estate. In *Union Mutual Life Ins. Co. v. Stevens*, 19 Fed. Rep. 671, the money, accruing on the policy at the death of the certificate

holder, was held to be assets in the hands of the administrator upon the ground that the assured himself appeared by name in the policy as the beneficiary. (*Kelly v. Mann*, 56 Iowa, 625; *McClure v. Johnson*, id. 620). In *Kelly v. Mann*, *supra*, where it was held that a policy of life insurance was not liable for the debts of the assured, but was collectible by his administrator, to be distributed by him according to law, the policy was payable to the "legal representatives" of the assured.

In the case at bar, where the policy or certificate is payable to "devisees, as provided in last will and testament," the proceeds of the certificate or policy might be regarded as belonging to the estate and liable for the debts thereof, if upon turning to the will, it had been found that the proceeds had been devised to the legal representatives of the estate of Benjamin F. Brooks, deceased, or to Alexander P. Petrie as the executor of that estate. By the terms of the third clause of the will, however, the devise or bequest—for the term "devisee" accompanying a bequest of personalty will be held to mean *legatee* (5 Am. & Eng. Ency. of Law,—1st ed.—p. 660)—is not to A. P. Petrie as executor, but to A. P. Petrie, individually, in trust for a certain purpose, without any designation of, or reference to, his representative capacity. The proceeds were devised or bequeathed to him in trust for the legal heirs named in the will, and to be disposed of in the following way, to-wit: "The principal to be kept at interest until the death of my wife, Ellen L. Brooks, or until my youngest child then living shall have attained the age of twenty (20) years should the death of my wife occur before the said child shall have attained that age, at the rate of eight per cent per annum, the interest or income to be paid to my wife, Ellen L. Brooks, quarterly." Such is not the language used in imposing duties upon an executor who is expected, as a general thing, by the terms of the statute, to settle up the estate at the expiration of a period of two years. The proof shows that the

youngest child of the testator, at the time of his death, was not more than three years of age. The proof also shows, that A. P. Petrie continued to pay interest on the "trust fund" to the widow, Ellen L. Brooks, for more than eleven years after he was appointed executor of the estate.

It is thus apparent that, by the terms of this will, A. P. Petrie was both trustee and executor. The declaration itself concedes the existence of this dual capacity by averring, that he never at any time filed a bond, or qualified, as trustee under said will, nor ever turned over the funds in his hands as executor to himself as trustee. The contention of the appellants is, that A. P. Petrie held the fund in his hands as executor from the time of his appointment as such by the county court in November, 1886, to the time of his death in December, 1898, a period of twelve years.

Second—The next question in the case is whether A. P. Petrie held the trust fund in question as executor, instead of holding it as trustee, upon the ground that having been, by the terms of the will, both trustee and executor, he never gave a bond as trustee; and upon the further ground that, even if the fund in question was not originally legal assets of the estate, yet it was in fact taken and treated as such by the executor; that, having thereby become assets in the hands of the executor, it remained such up to the time of the death of A. P. Petrie; and that, therefore, the bondsmen of the latter should be holden for it. There is much force in the position taken by the appellants in reference to this matter.

In his petition to the county court to be appointed executor, A. P. Petrie mentioned the proceeds of the benefit certificate as a part of the estate of which Benjamin F. Brooks died possessed. In his inventory presented to the county court, he also mentioned the insurance policy or certificate as a part of the estate of Benjamin F. Brooks. The bond, also, which he gave as executor, was

fixed in a sufficiently large amount to cover the proceeds of the certificate. It is to be observed, however, that, when he gave a receipt to the benefit association or insurance company for the amount of the policy, he signed the receipt in his individual name, and not as executor. It is also to be noticed that, although the amount of the widow's award exceeded the whole value of the personal property, owned by the deceased, excluding the certificate or policy, yet no amount was taken out of the proceeds of the certificate to pay such deficiency in the award. Nor was any part of the proceeds of the certificate applied towards the payment of any of the debts of the deceased, if there were any. It is true, that the first receipt, signed by the widow for interest on the trust fund, recites that such interest is "received of A. P. Petrie, executor of B. F. Brooks;" and that the sixth receipt, dated in May, 1888, executed by the widow for interest on the trust fund, recites that such interest is "received of A. P. Petrie, administrator of the estate of B. F. Brooks." These receipts, however, were not signed by A. P. Petrie, but by Ellen L. Brooks, the widow. Nor is there any evidence that they were drawn by A. P. Petrie. The fact, therefore, that he is described in one of them as executor, and in the other as administrator, is not significant, as indicating that he held the fund in the capacity of executor. If the receipts are important evidence upon this subject, the majority of them would indicate that the interest on the fund was not paid by him as executor, but on the contrary, as trustee, because the remaining sixteen of the receipts, commencing on February 18, 1887, and ending on August 18, 1898, all of which are signed by the widow, recite that interest on the "trust fund" of the estate of B. F. Brooks is "received from A. P. Petrie," thus designating him as an individual or in his capacity as trustee, and not in his capacity as executor.

The fact, that the executor mentioned the fund in his petition for appointment, and in his inventory, as being

a part of the property of the estate, has no other or different significance than if, in a report by him as executor, he had charged himself as executor with the trust fund in question. Such a charge, made by the executor against himself, has been held not to create a liability against the sureties upon his bond, if they were not otherwise liable under the law or the statute.

In *Clay v. Hart*, 7 Dana, (Ky.) 1, it was held that "the sureties of an executor cannot be made liable for funds, which the executor received as agent or trustee for a legatee, though he has charged himself with them in his executorial accounts."

In *Shields v. Smith*, 8 Bush. 601, it was held that the sureties of an administrator with the will annexed could not be held liable for funds which he received, not as administrator, but as agent for the widow and heirs, though he charged himself with such funds as administrator.

In *Commonwealth v. Gilson*, 8 Watts, 214, it was held, that the sureties in an ordinary administration bond are not liable for the proceeds of an intestate's real estate, though charged in the account of an administrator, as settled by the orphans' court.

Again, in *Pace v. Pace*, 19 Fla. 454, where the subject, out of which the suit arose was a contract of insurance made by a life insurance company, and where it was held, that the administrator would not hold the proceeds of the policy as general assets in his hands liable to the payment of debts or to distribution according to the law of the domicile of the intestate, it was said: "The sureties upon the bond of an administrator who has collected moneys, neither assets of the estate nor subject to distribution by him, and to which, as the legal representative of the decedent, he was not entitled, are not liable for any appropriation or use of the same by the administrator for his personal benefit."

In *Robinson v. Millard*, 133 Mass. 236, which case is referred to with approval by this court in *People v. Huffman*,

182 Ill. 390, the Supreme Court of Massachusetts said: "The fact, therefore, that the executors here saw fit to charge themselves in their general account with the balance remaining after payment of debts, legacies and charges, does not conclude the sureties under the general bond."

In *People v. Huffman*, *supra*, it was held by this court that the report of an executor, showing a certain balance in his hands as of the date of his report, is not conclusive on his sureties in an action to enforce their liability on the bond, when the report was not approved by an adjudication of the court. Therefore, under the authorities, it cannot be said that the circumstances relied upon by the appellants, as indicating that the fund in question was treated by the executor as a part of the assets of the estate, are conclusive upon the sureties so as to make them liable. The liability of a surety is *strictissimi juris*. (*People v. Toomey*, 122 Ill. 308).

The general doctrine is, as announced by Woerner in his work on the American Law of Administration, (vol. 1, —2d ed.—sec. 260), that, "where a will makes the same person executor and trustee, the executor's bond cannot be construed as conditioned for the performance of the duties belonging to the trustee; a separate bond should in such case be given as trustee." *(clerk only)*

In *Hinds v. Hinds*, 85 Ind. 312, it was held that the bond of an executor, given to secure the faithful discharge of his duties as executor, cannot be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will. This same doctrine was recognized and approved by this court in *People v. Huffman*, *supra*, where we said (p. 405): "Under the statute as it now stands, where a will makes the same person executor and trustee, the executor's bond cannot be construed for the faithful performance of the duties belonging to the trustee. A separate bond should be given by the trustee." As was said in *Hinds v. Hinds*, *supra*, it does not

follow from this doctrine, that the *cestuis que trust* need be without any security except the personal responsibility of the trustee for the faithful discharge of the duties of his trust, because a court of chancery has the power and jurisdiction to require the trustee in such a trust to execute bond with sufficient sureties conditioned for the faithful performance of the duties of his trust, and for the preservation of the trust fund.

Third—It is contended on the part of the appellants that, inasmuch as A. P. Petrie failed to file any report as executor, the plaintiffs below were entitled to nominal damages, and that the judgment should therefore be reversed and the cause remanded for this reason.

Upon this point we are content with what is said by the Appellate Court in their decision of this case, which is as follows (p. 663): "This point is purely technical, for, if we are correct in concluding this fund was not part of the estate to be accounted for to the county court, then the papers filed there by the executor showed he had turned over to the widow all the personal property of the estate; and the only report he could have made would have been to formally charge himself with said property and credit himself for its delivery to the widow; that is, to state in the form of a report only facts and figures already appearing in papers filed by the executor in 1886. Plaintiffs tendered various propositions of law, but none upon the subject of the right to recover nominal damages because of the failure to file a report. They moved for a new trial, and filed the points relied upon therefor, and did not assign failure to award nominal damages as one of them. They are restricted to the reasons they then assigned. Besides, courts will not award a new trial merely to enable a party to recover nominal damages." (*Comstock v. Brosseau*, 65 Ill. 39).

For the reasons above stated, the judgments of the Appellate Court and of the circuit court are affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

WILLIAM H. LUTHARDT.

Opinion filed October 24, 1901.

1. MUNICIPAL CORPORATIONS—*acts of chief of police, based on council proceedings, are binding on city.* The acts of a chief of police, when based upon the proceedings of the common council giving color and supposed authority thereto, are binding upon the city.

2. SAME—*when a re-instated municipal officer may recover back salary.* A municipal officer, regularly chosen under the Civil Service act, who is illegally dismissed from his office and prevented from performing its duties by the chief of police, who acted under proceedings of the common council, had at his request, failing to make any appropriation for the salary of the office, may, upon re-instatement by *mandamus*, recover back salary from the city, where it has not been paid to any one performing the duties of the office.

3. FEES AND SALARIES—*salary follows the legal title to the office.* The legal right to an office carries with it the right to the salary or emoluments of the office.

City of Chicago v. Luthardt, 91 Ill. App. 324, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

CHARLES M. WALKER, Corporation Counsel, WILLIAM H. FITZGERALD, and ROSWELL B. MASON, for appellant:

The city is not responsible or liable for the acts of the superintendent of police and city council complained of, for the reason that said acts were beyond the scope of the authority of the superintendent of police and the city council, contrary to the Civil Service law and civil service rules, and void. 1 Dillon on Mun. Corp. (4th ed.) sec. 457, p. 528; Hurd's Stat. 1899, sec. 12, p. 353; *Lorillard v. Monroe*, 11 N. Y. 392; *Mitchell v. Rockland*, 41 Me. 363.

The appellee is an employee and not an officer of the city of Chicago, and is therefore not entitled to any compensation from the city of Chicago, as he did not perform

the services which he was employed to perform. Even if appellee be held to be an officer he cannot recover from the city, as he rendered no services to the city. *Mechem on Public Offices and Officers*, secs. 2, 4; *United States v. Maurice*, 2 Brock. (U. S. C. C.) 96; *Collins v. Mayor*, 3 Hun, 680; *Opinion of Judges*, 3 Greenl. 481; *Jeffries v. Harrington*, 11 Col. 191; *Shanley v. Brooklyn*, 30 Hun, 396; *Bunn v. People*, 45 Ill. 397; 19 Am. & Eng. Ency. of Law, (1st ed.) 337; *People v. Loeffler*, 175 Ill. 585; *People v. Langdon*, 40 Mich. 673; *Dolan v. Mayor*, 68 N. Y. 274; *Smith v. Mayor*, 37 id. 518; *Auditors of Wayne County v. Benoit*, 20 Mich. 176; *Farrell v. Bridgeport*, 45 Conn. 191.

A special appropriation having been made by the city council for the appellee's compensation for the year 1898, the appellee is not entitled to recover in this action of assumpsit therefor. He must look to this appropriation only. The city is not generally liable for his compensation. To hold it so violates sections 2, 3 and 4 of article 7 of the city charter. A judgment cannot legally be entered against the city in this action of assumpsit. *Hurd's Stat.* 1899, art. 7, chap. 24, p. 282; *Kimble v. Peoria*, 140 Ill. 161; 1 Dillon on Mun. Corp. sec. 459, p. 534; *Crane v. Urbana*, 2 Ill. App. 560; *Brauns v. Peoria*, 82 Ill. 12; *Illinois Hospital v. Higgins*, 15 id. 185; *Chicago v. Williams*, 182 id. 135; *East St. Louis v. Flannigan*, 34 Ill. App. 596; *Lake v. Trustees*, 4 Denio, 520; *Springfield v. Edwards*, 84 Ill. 626; *Kingsbury v. Pettis County*, 48 Mo. 207; *County Comrs. v. Cox*, 6 Ind. 403; *Argenti v. San Francisco*, 16 Cal. 275; *Martin v. San Francisco*, id. 286; *Bayerque v. San Francisco*, 1 McAllister, 175; *Stoneware Co. v. Taylor*, 30 Am. & Eng. Corp. Cas. 431; *Dayton v. Rounds*, 27 Mich. 83; *Shaw v. Sattler*, 74 Cal. 259; *San Francisco Gas Co. v. Brickwedel*, 63 id. 642.

EDWIN BURRITT SMITH, CHARLES H. BLATCHFORD, and CLAYTON R. TAYLOR, for appellee:

The appellee was and is an officer of the city of Chicago. As such officer he became and is entitled to the

salary appropriated for him as an emolument of his office, whether he did or did not discharge the duties thereof. Civil Service act, sec. 3; Dillon on Mun. Corp. sec. 235; *People v. Loeffler*, 175 Ill. 585; *Memphis v. Woodward*, 12 Heisk. 499; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; *Dorsey v. Smyth*, 28 Cal. 21.

The legislature may provide for the appointment of officers in the municipal government in the mode adopted by the Civil Service act. In the absence of any constitutional restriction the power of the legislature is ample to provide the mode of appointment to be adopted in selecting municipal officers. *People v. Loeffler*, 175 Ill. 585.

Where an officer of a municipal corporation, elected by the people for a specified term, is improperly removed by the city council, he may sue the corporation for his salary and perquisites for the time intervening between his removal and the expiration of the term. 1 Dillon on Mun. Corp. sec. 235; *Stadler v. Detroit*, 13 Mich. 346; *Shaw v. Mayor*, 19 Ga. 468.

Per CURIAM: In deciding this case the Appellate Court made the following statement of the case and rendered the following opinion:

"In November, 1896, appellee, having been examined by the civil service commissioners of Chicago pursuant to the Civil Service act of the General Assembly of 1895 and of rules adopted by said commissioners thereunder, was certified, selected and appointed as chief clerk of the detective bureau of the department of police, with an annual salary of \$1500. He thereupon entered upon the discharge of his duties and continued the same until March 31, 1898, when he was dismissed by the chief of police of the city from his position, and from that date the chief of police refused to allow him to perform his duties until he obtained a *mandamus* restoring him to his position, after which he was paid his salary from January 1, 1899. He brought suit in assumpsit against appel-

lant to recover his salary from April 1 to December 31, 1898, and recovered a judgment therefor, including interest, amounting to \$1204.69, from which this appeal is taken."

Opinion by Mr. Justice WINDES:

"It is claimed that the city is not liable in this action because the acts of the chief of police of the city in refusing to allow appellee to perform the duties of his position, which acts are based upon the proceedings of the common council of said city, had at the request of said chief, in failing to make any appropriation for the salary or compensation for the year 1898 for the office or position of appellee, by the name of 'Chief clerk of the detective bureau of the department of police,' were beyond the scope of the authority of said chief of police and council and contrary to the Civil Service law and civil service rules. We think this claim is untenable, for the reason that the acts of the chief of police, when based, as this record shows they were, upon the proceedings of the common council giving color and a supposed authority thereto, are binding upon the city of Chicago. The city speaks and acts through the common council in such matters, and cannot thus be allowed with impunity to violate the act of the legislature and the lawful rules of the civil service commission made in pursuance of and by authority of such legislative act and rules authorized thereby, and in no way questioned in this proceeding. (*Maher v. City of Chicago*, 38 Ill. 266; *City of Chicago v. Chicago and Western Indiana Railroad Co.* 105 id. 78; *City charter*, art. 5, sec. 1, par. 2.) Moreover, as was held in *Kipley v. Luthardt*, 178 Ill. 525, the attempt of the council to dismiss appellee and deprive him of his position was ineffectual, and appellee's rights remained the same as if no action had ever been taken by the chief of police or the council.

"Appellant further claims that the appellee is an employee, and not an officer, of the city of Chicago, and for

that reason is not entitled to any compensation, as he did not perform the services he was employed to perform; and even if he is an officer he cannot recover, because he rendered no services to the city for the period for which the suit is brought. The duties of appellee's office or position were as follows: To receive all letters and telegrams received by or referred to the chief of detectives relative to police business, number and index the same, and see that proper reports are made thereon and that they are answered and filed or otherwise disposed of, as may be directed; to prepare and send out all letters and telegrams issued from the detective bureau; to make out fugitive warrants and prepare requisitions for extradition of fugitives from justice wanted by the Chicago police department; to see that the books and records of the detective bureau are properly made out and kept, and to prepare and make such reports as may be required.

"Numerous cases and authorities are cited by appellant, which, it is claimed, establish that because appellee's duties were purely of a clerical character his position was that of a mere employee of the city, and not an officer. Conceding that under the test of these authorities the position of appellee was not that of an officer in the strict sense, we think they are not applicable in the case at bar. In the case of *People v. Loeffler*, 175 Ill. 585, in which the Supreme Court had under consideration the question as to whether the positions covered by the Civil Service act were offices, within the meaning of section 24, article 5, of the constitution, it was held that the offices or positions provided for under the Civil Service act, while not strictly offices within the meaning of the constitutional provision, were in a sense municipal offices. The court say: 'Inasmuch as the definition of 'office' in section 24 refers to State and not to municipal offices, there is no provision in the constitution prescribing any particular mode for the appointment of officers in municipal corporations. The legislature, therefore, may

provide for the appointment of officers in the municipal government in the mode adopted by the Civil Service act. In the absence of any constitutional restriction the power of the legislature is ample to provide the mode of appointment to be adopted in selecting municipal officers.'

"Section 3 of the Civil Service act empowers the commissioners to classify all the offices and places of employment in the city, except those who are elected by the people and others specified in section 11 of the act, not now in question, and provides that the offices and places so classified by the commission shall constitute the classified civil service of the city. Section 4 of the same act provides that the commissioners shall make rules for carrying out the purposes of the act, and for examinations, appointments and removals in accordance with its provisions. The commissioners did adopt rules, classified the offices and places of employment into two general classes, known as class 'A' and class 'B,' respectively. These rules provide (No. 3) that class 'A' shall be known as the official service and class 'B' as the labor service, and under the further provisions of the rules as to classification, the chief clerk of the detective bureau falls in class 'A,' division 'C' and grade 5. It will thus be seen that under the Civil Service act and the rules of the commissioners the position of appellee was that of a municipal officer, within the meaning of this act.

"It was held by the Supreme Court in the case of *Kipley v. Luthardt*, (the appellee in this case,) 178 Ill. 525, that the appellee was illegally dropped from his position as chief clerk of the detective bureau during the time for which he seeks to recover his salary. Moreover, it appears from this record that appellee was dismissed from his position or office and not allowed to perform the duties thereof, in direct violation of section 12 of the Civil Service act, which provides that no officer or employee in the classified civil service of any city, who shall have been appointed under the rules of the commission, and

after examination shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. There were no charges preferred against appellee, and the only pretense for his dismissal and the refusal by the chief of police to allow appellee to perform the duties of his office was the failure of the common council of the city to make an appropriation for his salary in the appropriation bill for the year 1898 by the name of 'Chief clerk of the detective bureau of the department of police,' and in attempting to discontinue or abolish said office or position by changing the name thereof to 'Secretary of the chief of detectives, rank of lieutenant,' without in any way changing the duties of said office or position, and by making an appropriation of \$1500 for the salary of said office of chief clerk under the name and style of 'Secretary to chief of detectives, rank of lieutenant.'

"Appellee, then, being a municipal officer and prevented from the performance of the duties of his office by the acts of the chief of police and the common council of the city, and it not appearing from this record that the appropriation for the salary of his office has been paid to any one performing the duties of the office, appellee is entitled to recover. We think the fact that the appropriation was made under the name and style of 'Secretary to chief of detectives, rank of lieutenant,' the duties of the office and the salary being the same, can make no difference. The duties of the office during the time for which recovery is sought, it is true, were performed and the office held by one Joyce, who was a sergeant of detectives in the department of police, for which latter position a salary of \$125 per month was appropriated. It does not appear that Joyce received the salary pertaining to appellee's office, and we regard it as immaterial that the appropriation for the police department of the city for the year 1898 is exhausted. If exhausted, it was without authority of law, so far as concerns ap-

appellee's salary, as it does not appear to have been paid to Joyce, who, without warrant of law, held appellee's office and performed its duties. (1 Dillon on Mun. Corp. sec. 235; *Stadler v. Detroit*, 13 Mich. 346; *Dorsey v. Smyth*, 28 Cal. 21; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; *Andrews v. Portland*, 79 Me. 484; *Indiana v. Carr*, 13 L. R. A. 177, and cases cited; *Rasmussen v. Commissioners*, 45 id. 295, and cases cited.) In the *Andrews case*, *supra*, the court say: 'The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited.'

"While there is some conflict in the authorities which we deem it unnecessary here to review, we are of opinion that the weight of authority is as above stated, and this rule is sustained by late and well-considered cases cited *supra*, and seems to us just, reasonable and in accord with sound legal principles.

"It is further said that appellee cannot recover because there has been an appropriation for his salary for the year 1898, and he must look to this appropriation, and to hold the city liable would be a violation of sections 2, 3 and 4 of article 7 of the city charter, and numerous authorities are cited in support of the contention. We cannot, without unduly and unnecessarily extending this opinion, review these authorities. They do not, in our opinion, control the case at bar. The appropriation for the salary of appellee for the year 1898 was made and presumably is in the hands of the city treasurer. It does not appear to have been paid to a *de facto* officer holding the office of appellee and performing its duties. * * *

"It can make no practical difference to the appellant whether appellee's salary is paid from the appropriation already made or from an appropriation to be made for the purpose of paying the judgment in this case. If the appropriation for the year 1898 is still in the hands of the city treasurer, as it should be, appellee's judgment

may be paid from such appropriation. We cannot appreciate the force of appellant's contention that to hold the city liable to appellee for his compensation would in any way violate the sections of the city charter referred to, which relate to the incurring of expense by officers of the municipality without a previous appropriation therefor.

"The only other claim of error is as to the allowance of interest. This is obviated, as in the oral argument appellee's counsel voluntarily remitted the amount of interest included in the judgment, \$79.69.

"The judgment is therefore affirmed, less the amount of said interest, for the sum of \$1125, and costs of the superior court. Appellant will recover its costs in this court."

The foregoing correctly states and disposes of the case, and the opinion is adopted as the opinion of this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE CHICAGO GENERAL RAILWAY COMPANY

v.

FRANK H. SELLERS, Receiver.

Opinion filed October 24, 1901.

1. APPEALS AND ERRORS—*allegation of counsel that a constitutional question is involved does not confer jurisdiction.* Allegations of counsel in a pleading that a construction of a constitutional provision is involved does not confer jurisdiction on the Supreme Court.

2. SAME—*when construction of constitution is not involved.* The action of a court of equity in refusing to require a receiver to pay to the insolvent money for costs and solicitors' fees incurred by the insolvent on account of the receivership proceeding, does not require, on appeal, a construction of the constitutional provision that "no person shall be deprived of life, liberty or property without due process of law," and an appeal from the decision of the court lies to the Appellate Court.

APPEAL from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

C. C. & C. L. BONNEY, (LYMAN M. PAINE, of counsel,) for appellant.

DEFREES, BRACE & RITTER, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook county, entered on May 18, 1901, sustaining a demurrer to an intervening petition, filed by the appellant company against the appellee receiver, and dismissing such petition for want of equity.

The intervening petition was filed in the case of *Witbeck v. Chicago General Railway Co.* pending on the chancery side of said court, and wherein the bill was filed by Witbeck in April, 1900, as a creditor and stockholder of the Chicago General Railway Company, against said company and its directors and officers for the purpose of settling divers controversies between Witbeck and other stockholders, and for the purpose of obtaining the appointment of a receiver to operate the road pending the litigation. The appellant company was therein alleged to be insolvent, and about to be placed in such a position, by reason of its obligations and differences among its officers and stockholders, that it would be unable to perform its public functions as a street railway company. Sellers was appointed receiver therein.

The intervening petition of the appellant company prayed for an allowance to the appellant, out of the funds in the hands of the receiver, for the purpose of paying the fees and expenses of the appellant in the suit, in which appellee was appointed receiver of the appellant's property. The petition alleges that the receiver has \$25,000.00 of the funds of the company in his hands, and

prays that the receiver may be ordered and required to pay to the company out of said sum \$1000.00 for costs and expenses; \$2500.00 for the services of its solicitors in preparing its answer and cross-bill; \$10,000.00 for the services of its solicitors in attending court since the filing of the answer and cross-bill and in the preparation of pleadings and argument; and a further sum of \$10,000.00 for the defense in said suit of appellant's directors and officers.

By sustaining the demurrer to the intervening petition and dismissing the same, the court below refused to allow the receiver to pay to the appellant company, out of the funds in his hands, money for the costs, expenses and fees above named. It is quite clear that appellant should have taken its appeal, if it had any right of appeal from the order in question, to the Appellate Court, and not to this court. The appeal here simply seeks to review an order of the court below refusing to direct its receiver to pay out a certain amount of money for a certain purpose. None of the elements exist which justify an appeal to this court.

Section 88 of the Practice act provides that cases, where the "construction of the constitution is involved," shall be taken directly to the Supreme Court; and it is claimed by the appellant that there is here involved a construction of that provision of the constitution, which announces that "no person shall be deprived of life, liberty, or property, without due process of law." The mere allegation of counsel in a pleading, that a construction of the constitution is involved, is not sufficient to give this court jurisdiction. (*St. Louis Transfer Co. v. Canty*, 103 Ill. 423; *City of Virden v. Allan*, 107 id. 505; *Chaplin v. Comrs. of Highways*, 126 id. 264.) We are unable to see that, by this order, any question is raised as to the construction of the above constitutional provision. Appellant was not thereby deprived of its right of defense, if it had any, against the bill filed by Witbeck. Its petition shows

that it filed an answer to the bill in that case, and a cross-bill, and an amended and supplemental answer to the original bill, and that it employed counsel to perform these and other important services. When a court of chancery, in the exercise of its conceded powers, appoints a receiver, who takes possession of the property of a corporation, the putting of such property by the court into the possession of the receiver is not depriving the corporation of its property without due process of law. We pass no opinion upon the question whether the court below did or did not err in refusing to direct the receiver to make an allowance to the appellant out of the fund in his hands for costs, fees and expenses. But we are of the opinion that, by refusing to appropriate moneys in the hands of the receiver for such purpose, the court committed no such act, as necessitates a construction of the above quoted constitutional provision. No such construction of the constitution is involved, as justifies an appeal to this court, and entitles it to take jurisdiction before the Appellate Court has acted.

If the contention of the appellant is correct upon this subject, every erroneous judgment or decree, which has the effect of awarding to the complaining party, or of refusing to award to him, the relief prayed, presents, in the same sense, a constitutional question. It cannot be said that every man, who brings an action for that to which he claims to be entitled, and who, through the alleged error of the trial judge, fails to recover, is deprived of the benefit of due process of law in such sense, as to justify him in appealing directly to this court, without going through the Appellate Court.

The present appeal is dismissed for want of jurisdiction.

Appeal dismissed.

THE STATE BOARD OF EQUALIZATION *et al.*

v.

THE PEOPLE *ex rel.* Catharine Goggin *et al.**Opinion filed October 24, 1901.*

1. **TAXES**—*board of equalization acts as an original assessor of capital stock and franchises of corporations.* The State Board of Equalization, in assessing the capital stock and franchises of corporations, acts as an original assessor and not as a board of review.

2. **SAME**—*duty of assessing capital stock and franchises is mandatory.* The duty resting upon the board of equalization to assess the fair cash value of the capital stock, including franchises, of corporations, over and above the assessed value of the tangible property of such corporations, is mandatory, and its performance may be compelled by *mandamus* when omitted or evaded.

3. **SAME**—*assessment may be impeached because fraudulently made too low.* An assessment of property for taxation may be impeached where it has been fraudulently made at too low a rate.

4. **SAME**—*when fraud in making assessment is established—mandamus.* Fraud on the part of the State Board of Equalization in assessing the capital stock and franchises of corporations is established, and its pretended assessments may be disregarded and the board be coerced by *mandamus* to make such assessments, where it is shown that the board has violated every well known rule for valuing such property, has refused to consider either the assessors' statements as to values or information furnished on the subject by interested parties, and has arbitrarily fixed the assessments at a grossly inadequate sum under rules passed by it for the occasion.

5. **SAME**—*rule for valuing capital stock and franchises of corporations.* To ascertain the fair cash value of the capital stock of a corporation, including the franchise, the market or fair cash value of the shares of stock should be added to the market or fair cash value of the debt of the corporation, excluding indebtedness for current expenses, and if, from the sum so obtained, the equalized or assessed valuation of the tangible property of the corporation be subtracted, one-fifth of the remainder will be the net assessed valuation of the capital stock of the corporation, including the franchise, over and above the assessment of its tangible property.

6. **SAME**—*board of equalization has power to assess omitted property when acting as an original assessor.* The modification of section 276 of the Revenue act by the Revenue act of 1898, by which the power of assessing omitted property is taken from the local assessor and conferred upon the board of review, does not apply to the State Board of Equalization when acting as an original assessor of the capital stock and franchises of corporations.

191 528
218 *617

7. **MANDAMUS**—*adjournment of board does not remove it from the coercive power of the court.* Adjournment of the State Board of Equalization pending an application for *mandamus* to compel it to assess omitted property does not take away the power of the court to enforce obedience to its writ of *mandamus*, subsequently issued, commanding the board to re-convene and assess such property.

8. **SAME**—*when demand and refusal to perform are unnecessary.* In cases where the duty sought to be enforced by *mandamus* is of a public nature and there is no one empowered to demand its performance, the law imposing the duty stands as a continual demand, and there is no necessity for a specific demand and refusal.

9. **PRACTICE**—*on affirming judgment awarding mandamus Supreme Court need not fix date of return.* On affirming a judgment awarding a writ of *mandamus* the Supreme Court need not fix the date when a return of the writ shall be made, since, under section 82 of the Practice act, the certified copy of the order of affirmance operates as a *procedendo* when filed, and the trial court becomes re-invested with jurisdiction and may proceed as if no appeal had been taken.

APPEAL from the Circuit Court of Sangamon county; the Hon. OWEN P. THOMPSON, Judge, presiding.

JOHN S. MILLER, and MERRITT STARR, (JOHN P. WILSON, of counsel,) for appellants.

I. T. GREENACRE, and E. S. SMITH, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This is a petition for a writ of *mandamus*, filed in the circuit court of Sangamon county by the State's attorney of said county, upon the relation of Catharine Goggin and Robert C. Steele, against the State Board of Equalization and the members thereof, (naming them,) to coerce said board, and the members thereof, forthwith to value and assess, in the manner provided by law, the capital stock, including franchises, of each of the following named corporations: Chicago City Railway Company, West Chicago Street Railroad Company, North Chicago Street Railroad Company, Chicago Union Traction Company, People's Gas Light and Coke Company, Chicago Telephone Company, Chicago Edison Company, Chicago Consolidated Traction Company, Chicago Electric Tran-

sit Company, Chicago and Jefferson Urban Transit Company, Evanston Electric Railway Company, Cicero and Proviso Street Railway Company, North Chicago Electric Railway Company, North Side Electric Street Railway Company, Ogden Street Railway Company, Chicago North Shore Street Railway Company, Chicago Electric Traction Company, Chicago General Railway Company, South Chicago City Railway Company, General Electric Railway Company, Chicago West Division Railway Company, Chicago Passenger Railway Company, and North Chicago City Railway Company.

The petition alleges that on April 1, 1900, said corporations, and each of them, were duly organized under the laws of the State of Illinois, one of which was a gas company, one a telephone company, one an electric light company and each of the others a street railway company; that they were all located in and had tangible and intangible property subject to assessment and taxation in Cook county, Illinois; that the fair cash value of the capital stock, including franchises, of said corporations, over and above the assessed value of their tangible property, aggregated the sum of \$235,000,000, and that said State board, and the members thereof, have refused to value and assess said capital stock, including franchises, as provided by law, and intend this year, as heretofore, not to value or assess said capital stock, including franchises, upon a basis of the fair cash value thereof, but intend to value and assess the same in such manner as to cause said corporations, and each of them, to pay no capital stock tax.

After a demurrer had been overruled to said petition, all the respondents, with the exception of Solomon Simon, who filed an answer confessing the same, filed joint and several answers thereto, admitting the existence and location of said corporations but denying that all of said corporations had tangible and intangible property in Cook county on April 1, 1900; averring that under

the law the State Board of Equalization, and none other, is vested with jurisdiction and power to value and assess the capital stock of said corporations; denying that the respondents had refused to value and assess the property of said corporations; averring that the State Board of Equalization was in session and had not completed its work at the time of the filing of the petition herein, and denying all other allegations contained in said petition and that the petitioner was entitled to the relief prayed for. A replication having been filed and a jury waived, a trial was had before the court, and on May 1, 1901, a judgment was rendered by the court against the respondents awarding the writ of *mandamus* as prayed for, except as to the Chicago Electric Traction Company, the Chicago General Railway Company and the General Electric Railway Company, from which judgment an appeal has been prosecuted to this court.

It is first contended the action and judgment of the State Board of Equalization with respect to the existence or value of the property of the corporations in question are not subject to review by the courts.

The State Board of Equalization on the third day of December, and during the time intervening between the filing of the petition and the rendition of judgment, adjourned its session for the year 1900 without having valued and assessed at any amount the capital stock and franchises of thirteen of said corporations, and after having valued and assessed the capital stock and franchises of seven of said corporations at an amount so low, as is contended by the petitioner, as to amount, in law, to a fraudulent valuation and assessment, and therefore to amount to no assessment at all. The question, therefore, presented here for our determination is, not whether the court has power to review the judgment of the State Board of Equalization in the fixing of values upon property assessed by it, but whether, when property has been wrongfully omitted which is taxable or fraudulently as-

essed at so low a rate as to amount, in law, to no assessment at all, the court may compel said board to perform its duty by assessing said property.

Section 1 of article 9 of the constitution of 1870 (Hurd's Stat. 1899, p. 68,) provides: "The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax * * * persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

Paragraph 4 of section 3 of chapter 120 (Hurd's Stat. 1899, p. 1394,) reads as follows: "The capital stock of all companies and associations now or hereafter created under the laws of this State except those required to be assessed by the local assessors, as hereinafter provided shall be so valued by the State Board of Equalization as to ascertain and determine respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association; such board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock, as to it may seem equitable and just, and such rules and principles when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject however, to such change, alteration or amendment as may be found from time to time, to be necessary by said board: *Provided*, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of such company or association shall not be assessed or

taxed in this State. This clause shall not apply to the capital stock, or shares of capital stock of banks organized under the general Banking laws of this State or under any special charter heretofore granted by the legislature of this State: *Provided, further*, that companies and associations organized for purely manufacturing purposes or for the mining and sale of coal, or printing or for publishing of newspapers or for the improving and breeding of stock, shall be assessed by the local assessors in like manner as the property of individuals is required to be assessed."

Paragraph 1 of said section 3 (Hurd's Stat. 1899, p. 1393,) provides: "All personal property, except as herein otherwise directed, shall be valued at its fair cash value;" and section 108 of said chapter (Hurd's Stat. 1899, p. 1412,) provides: "The State Board of Equalization shall assess the capital stock of each company or association, respectively, now or hereafter incorporated under the laws of this State, in the manner hereinbefore in this act provided. The respective assessments so made (other than of the capital stock of railroad and telegraph companies) shall be certified by the Auditor, under direction of said board, to the county clerk of the respective counties in which such companies or associations are located, and said clerk shall extend the taxes for all purposes on the respective amounts so certified the same as may be levied on the other property in such towns, districts, villages or cities in which such companies or associations are located."

By virtue of said constitutional provision and sections of the statute, the State Board of Equalization, in assessing the capital stock and franchises of corporations, does not act as a board of review but as an original assessor, and the duty resting upon said board to value and assess the fair cash value of the capital stock, including the franchises, over and above the assessed value of the tangible property of all companies and associations now or

hereafter created under the laws of this State, except those required to be assessed by the local assessors, is mandatory, and the performance of such duty, when omitted or evaded, may be enforced by *mandamus*.

Section 32 of chapter 120 (Hurd's Stat. 1899, p. 1400,) provides that all corporations and associations incorporated under the laws of this State, other than banks organized under any special or general laws of this State, and the corporations required to be assessed by the local assessors, shall, in addition to other property required to be listed, make out and deliver to the assessor a sworn statement of the amount of their capital stock, setting forth particularly the name and location of the company or association; the amount of capital stock authorized and the number of shares into which such capital stock is divided; the amount of capital stock paid up; the market value, or if no market value, then the actual value of the shares of stock; the total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property, and the assessed valuation of all its tangible property. Such statement shall be made in conformity to the instruction and upon forms to be prescribed by the Auditor of Public Accounts; and in case of a failure or refusal of any person, officer, company or association to make such return or statement, it is made the duty of the local assessor to make such return or statement from the best information he can obtain. By section 33 of the same act the assessor is required to return such statement to the county clerk, the county clerk is directed to forward such statement to the Auditor of Public Accounts, and the Auditor is required, annually, on the meeting of the State Board of Equalization, to lay before said board the statements required to be returned to him, and said board is required to value and assess the capital stock of such companies or associations in the manner provided by said act.

Eighteen of the corporations named in said petition, including the thirteen whose capital stock the State Board of Equalization failed to assess, failed to make such returns for the year 1900, as is directed by said statute, whereupon the statements as to them were made by the board of assessors, as required by law, and returned to the county clerk of Cook county, by him forwarded to the Auditor of Public Accounts and by him laid before the State Board of Equalization at its annual meeting, and were in its possession long prior to the time of filing the petition herein. On October 17, at a meeting of the State Board of Equalization, there was read in open session a communication which it and each member thereof had before that time received, relating to the capital stock valuations of the corporations named in said petition, including the thirteen companies whose capital stock it failed to assess, which was as follows:

"Oct. 8, 1900.

"To the honorable members of the State Board of Equalization of the State of Illinois:

"GENTLEMEN—The undersigned, the tax investigating committee of the Chicago Teachers' Federation, herewith present to you a memorandum of information compiled by said committee. We believe the information to be correct, and are ready to produce before your honorable body, or its proper committee, evidence to support the statements made.

"The twenty-three companies named paid no capital stock tax for last year. We trust they may this year be compelled to pay what is just. Their capital stock and bonds are valued at \$268,108,312. The tangible property of fourteen of these companies has an assessed value of \$5,676,032. The assessed valuation of the tangible property of the remaining nine companies is estimated at \$779,717. Estimated value of total tangible property is \$6,455,794. The full value is five times that sum, or \$32,278,745, leaving the valuation of intangible property subject to capital stock tax, \$235,829,567. We respectfully request that your board value and assess the capital stock of such companies in the manner provided by law.

"Respectfully,

(Seal.)

CATHARINE GOGGIN,
MARGARET A. HALEY,
Tax Investigating Com. Chicago Teachers' Federation."

The evidence shows that said Catharine Goggin and Margaret A. Haley, as the representatives of the Chicago Teachers' Federation, had frequently pointed out to the board and the members thereof, and especially the committee on assessment of capital stock of corporations, that the assessments as made for previous years by the State Board of Equalization permitted said corporations to escape taxation on their capital stock, including franchises, and urged upon the board and its members that the same be assessed for the year 1900. It further appears from the statements prepared by the board of assessors, and which had been laid before the board by the Auditor, and from evidence collected by the relators and offered to be submitted to the State Board of Equalization by said relators, and which is uncontradicted, that the value of the capital stock and franchises, including the bonded indebtedness, exclusive of the assessed tangible property of the thirteen corporations which the board totally failed to assess for the year 1900, amounted to approximately \$85,000,000, and that said omitted companies earned during the year prior to April 1, 1900, a guaranteed dividend of from six per cent to thirty-five per cent per annum upon their stock, mainly in the form of rents received from leases of their rights and privileges to use the streets of the city of Chicago, to other corporations.

The only reason assigned by the respondents as an excuse for omitting said thirteen corporations from the list of corporations assessed by them is to be found in the statement of their counsel that the property of eight of said corporations had been assessed to the Chicago Consolidated Traction Company, and that in making the assessment of the property subject to taxation of said Consolidated company they had included the property of said eight corporations, and that the property of five of said corporations had been assessed to the Chicago Union Traction Company, and that in making the assess-

ment of the property subject to taxation of said Chicago Union Traction Company they had included the property of said five corporations. No evidence was introduced to support the claim of counsel and such claim is disproved by the record. The net assessment of capital stock and franchises of the Chicago Consolidated Traction Company over and above its tangible property, as assessed by the local assessors, was fixed by the State board at \$100,000 while that of the Chicago Union Traction Company was fixed at \$600,000, which, according to the contention of counsel for respondents, would make the net total assessable cash value of the capital stock and franchises of said thirteen omitted companies and said Chicago Consolidated Traction Company and Chicago Union Traction Company aggregate the sum of \$700,000, while the uncontradicted evidence establishes beyond doubt that the cash value of the capital stock of the Chicago Consolidated Traction Company and the Chicago Union Traction Company, together with their bonded indebtedness after deducting therefrom the assessed value of their tangible property, alone exceeds that amount by a large sum. It therefore clearly appears that the capital stock and franchises of said thirteen omitted companies, as a matter of fact, were not valued and assessed by said State Board of Equalization to said several corporations, nor were the same included in the assessment of said traction companies, but that the same were wholly omitted from the assessment of 1900.

We have repeatedly held that an assessment may be impeached on the ground that property has been fraudulently assessed at too high a rate. In *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, we say (p. 609): "Where * * * the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part against the tax-payer, and the court will interpose." And in *Chi-*

cago, Burlington and Quincy Railroad Co. v. Cole, 75 Ill. 591, (on p. 594): "Valuations must be the result of honest judgment, and not of mere will." The converse of the proposition must be true, and an assessment may be impeached where the assessment has been fraudulently made at too low a rate. Of the seven corporations which were assessed at some amount, the People's Gas Light and Coke Company was one. That company filed with the Auditor a statement, which was sworn to by its secretary, on the 17th day of November, 1900, and after the commencement of this suit. This statement was laid before the State Board of Equalization by the Auditor at the time the property of said corporation was assessed. The statement showed the amount of capital stock paid up to be \$28,668,800, the amount of indebtedness to be \$34,000,000 and the total value of the tangible property to be \$15,526,785. The aggregate amount of the value of the capital stock and the indebtedness, less the tangible property, amounted to \$47,142,015, one-fifth of which would be \$9,428,403, and was the amount, under the law, which should have been certified to the county clerk of Cook county, on which said clerk should have extended the taxes of said corporation on the basis that its stock was worth par. The evidence showed, however, the same to be worth \$106.50 per share, which fact should have materially increased its assessment. The amount, however, assessed against said company by the State Board of Equalization was \$450,000, or \$8,978,403 less than the company's own statement, subscribed and sworn to by its own secretary, showed to be the amount for which it should have been assessed. The assessment of this corporation is a fair illustration of the assessments made by the State Board of Equalization against the other six companies which it assessed.

It was the duty of the State Board of Equalization to assess the capital stock, including the franchises, of said corporations at the fair cash value thereof. Instead

of doing so, the respondents arbitrarily and willfully failed to follow a proper and long established rule in force in this State for making such assessments, by refusing to take into consideration, in making such assessments, the bonded indebtedness of said corporations. They also disregarded all other rules for the making of such assessments in force at the time of the filing of this petition, and for the purpose of evading their duty sought to pass new rules for their government in making said valuations and assessments, and refused to consider the information then before them, furnished to them by the assessors, as provided by statute, and assessed the capital stock and franchises of said corporations at a nominal sum, instead of at the fair cash value thereof. While it is true that fraud will not be presumed and that the decision of the State Board of Equalization in fixing the value of corporate property for the purpose of taxation is *quasi* judicial in its nature, still, when it is apparent to the court that every well known rule for the valuation of capital stock, including franchises, has been violated and arbitrarily disregarded by the board, and such board has refused to consider the statements as to values prepared by the assessors, under the statute, for its use, and has refused to consider information as to the value of such corporate property submitted to it by interested parties, and has arbitrarily fixed such assessments at a grossly inadequate sum under rules passed by it for the occasion, the court is justified in holding that fraud in the making of such assessments has been established, and such pretended assessments may be properly disregarded and treated as no assessment, and such board be coerced by the writ of *mandamus* to assess such property.

It is next contended that the respondents were not in default at the time the petition was filed; that the State Board of Equalization was then in session and had the entire session in which to value and assess the capital stock and franchises of said corporations, and that the

petition for *mandamus* was therefore prematurely filed. The general rule is, that before applying for a *mandamus* an express demand should be made, and there should be a refusal to perform, either express or implied. In cases, however, where the duty sought to be enforced is of a public nature, affecting the people at large, and there is no one especially empowered to demand its performance, there is no necessity for a demand and a refusal. The law requiring the duty stands as a continual demand. (13 Ency. of Pl. & Pr. 618; *People v. Board of Education*, 127 Ill. 613; *People v. Town of Mt. Morris*, 137 id. 576; *People v. Crabb*, 156 id. 155; *Comrs. of Highways v. Jackson*, 165 id. 17.) The State Board of Equalization met on the 10th day of September. On the 11th day of October the board, and each member thereof, were requested, in writing, to value and assess the capital stock and franchises of said corporations. Thereafter, and prior to the filing of the petition, the board did nothing toward the performance of its duty, and some of its members stated nothing would be done. Thirteen of said corporations were not assessed at all, and on the day the board adjourned its annual session seven were assessed at so low a rate as to amount to no assessment. The duty to assess the capital stock and franchises of said corporations rested upon the respondents from the first day of the session of the board, and continued from day to day throughout the session. Such duty could not be escaped by delay, and such delay and subsequent failure to act show conclusively that respondents were willfully in default from the beginning of the session to its close. We are therefore of the opinion that no further demand and refusal than was shown by the evidence was required prior to the filing of the petition.

It is further contended that the court should have declined to grant the writ because it appeared at the hearing that the State Board of Equalization had then adjourned its annual session, and it is said the court

could then see that the writ would be wholly without practical results, as the court would be powerless to enforce obedience thereto. The law is well settled that the termination of the office of a respondent in *mandamus* proceedings does not abate the writ, and that the proceedings may be continued against his successor in office without beginning *de novo*. (13 Ency. of Pl. & Pr. 756; *People v. Supervisor*, 100 Ill. 332.) Section 8 of the *Mandamus* act (Hurd's Stat. 1899, p. 1136,) provides that "the death, resignation or removal from office, by lapse of time or otherwise, of any defendant, shall not have the effect to abate the suit, but his successor may be made a party thereto and any peremptory writ may be directed against him."

In the case of *People v. Supervisor, supra*, a peremptory writ of *mandamus* had been awarded against the supervisor of a town, commanding him to execute, in behalf of the town, certain bonds to the relator. Such supervisor had not obeyed the command of the writ at the time his term of office had expired, and application was made for an *alias* peremptory writ against his successor in office to compel him to perform the acts which his predecessor in office had been by the first writ ordered to perform. The writ was granted, and the court, on page 334, say: "It is but asking for the repetition of the writ against the same party, represented by another person. * * * Where a continual and perpetual duty is incumbent upon certain public officers, the fact that the officers hold their tenure by annual elections will not prevent the court from interfering, since the duty, being continuing in its nature, may be enforced against the officers generally, and their successors."

The State Board of Equalization is created by the Revenue act, and the provisions of said act, so far as applicable, apply to said board. Sections 276 and 277 of said act (Hurd's Stat. 1899, p. 1441,) make provision for

the assessment of omitted property and the subsequent extension and collection of the taxes thereon, and are as follows:

"Sec. 276. If any real or personal property shall be omitted in the assessment of any year or number of years, or the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk. It shall be the duty of county clerks to add uncollected personal property tax to the tax of any subsequent year, whenever they may find the person owing such uncollected tax assessed for any subsequent year."

"Sec. 277. If the tax or assessment on property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year, in separate columns designating the year or years."

While we have held section 276 was modified by the Revenue law of 1898, (*People v. Sellars*, 179 Ill. 170,) so that the power to assess omitted property was taken from the local assessor and conferred upon the board of review, said section was not repealed, and such modification does not apply to the State Board of Equalization when acting as an original assessor of the capital stock and franchises of corporations, and said State board may still make the assessment of omitted capital stock and franchises of corporations under said section. We are therefore of the opinion that the writ can be obeyed, and

that there is no force in the contention that it would be wholly without practical results.

The trial court, upon behalf of the petitioner, held the following propositions of law, to which holding the respondents excepted:

"The court holds that in making the assessment of the capital stock of corporations, including the franchise, it is proper for the board to add the market or fair cash value of the shares of stock, and the market or fair cash value of the debt of the corporation, excluding the indebtedness for current expenses, and to take the aggregate amount so ascertained as the fair cash value of the capital stock, including the franchise, and to take therefrom the equalized or assessed valuation of the tangible property of the corporation, and one-fifth of the remainder would be the net assessed valuation of the capital stock of such corporation, including the franchise, over and above the assessment of its tangible property."

Also: "The court holds that the so-called rules adopted by the State Board of Equalization on the 22d day of November, 1900, do not present a correct and lawful method of determining the assessed valuation of the capital stock of corporations, including the franchise, over and above the equalized or assessed valuation of the tangible property."

Paragraph 4 of section 3, chapter 120, (Hurd's Stat. 1899, p. 1394,) provides the State Board of Equalization "shall adopt such rules and principles for ascertaining the fair cash value of such capital stock, as to it may seem equitable and just, and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject however, to such change, alteration or amendment as may be found from time to time, to be necessary by said board." In pursuance of the authority thus conferred, said board in the year 1873 adopted rules for its government in the assessment of the capital stock

and franchises of corporations. Said rules were amended in 1889, and thereafter remained in force until after the commencement of this suit, and are as follows:

"Resolved, That for the purpose of ascertaining the fair cash value of the capital stock, including the franchise, of all companies or associations now or hereafter created under the laws of this State, and for the assessment of the same, or so much thereof as may be found to be in excess of the assessed or equalized value of the tangible property of such companies and associations, respectively, we, the State Board of Equalization, hereby adopt the following rules and principles, viz.:

"First—The market or fair cash value of the shares of capital stock and the market or fair cash value of the debt to be determined by reference to the Stock Exchange or the books of said corporations; and the returns made to the State board, or other means, (excluding from such debt the indebtedness for current expenses,) shall be combined or added together, and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"Second—From the aggregate amount ascertained, as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all tangible property, respectively, of such companies and associations (such equalized or assessed valuation in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise,) which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

On the 22d day of November, and immediately following the overruling of respondents' demurrer to the petition filed herein, the State Board of Equalization passed a new set of rules for its government in the assessment of the capital stock and franchises of corporations, which are as follows:

"Resolved, That for the purpose of ascertaining the fair cash value of the capital stock, including the franchise, of all companies and associations now or hereafter created under the laws of this State, and for the assessment of the same, or so much thereof as may be found to be in excess of the assessed or equalized value of the tangible property of such companies

and associations, respectively, we, the State Board of Equalization, hereby adopt the following rules and principles, viz.:

"First—The capital stock of each said company or association shall be valued as an entirety, due consideration being given to the following propositions: (a) To the character and duration of the franchise of said company or association; (b) to the amount of the contribution (if any) demanded of and paid by said company or association, under the provisions of any contract or ordinance, to any municipality, as compensation for the use of its franchise privileges in said municipality; (c) the highest and lowest quotations of the shares of stock of said company or association during the twelve months immediately preceding the date of assessment, and the number of shares of stock sold at such quotations; (d) any other fact or condition or circumstance that will assist in arriving at a just, equitable, fair cash value of said capital stock.

"Second—From the aggregate amount ascertained, as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations, wherever the same may be located, (such equalized or assessed valuation of its Illinois property being taken, in each case, as the same may be determined by the equalization or assessment of property by this board,) and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State.

"Third—The above and foregoing are declared to be the only existing rules and principles adopted by this board for its government in the assessment of the capital stock of companies or associations."

The State Board of Equalization has power to pass such rules for ascertaining the fair cash value of the stock of corporations, including franchises, as it may deem equitable and just, provided such rules are not inconsistent with the constitution or the Revenue act. The purpose of such rules is to provide, so far as possible, a certain and uniform method of ascertaining the fair cash value of the capital stock, including franchises, sought to be assessed. In furtherance of that object the rules in

force at the time the petition herein was filed were passed soon after the constitution of 1870 went into effect, and were in full force at the time of the commencement of this suit. They are well adapted to produce the result desired, and have not only been uniformly applied by preceding State Boards of Equalization, but have met the approval of this court as well as the Supreme Court of the United States, and the method pointed out therein for assessing capital stock and franchises would be a proper one for the board to follow even though no rules had ever been formally passed by the board adopting said method.

In *Porter v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561, the court, speaking by Mr. Justice SCHOLFIELD, said (p. 588): "It is argued that, by adopting this mode of valuation, the board assessed the corporation upon the value of the debts which it owes, and which are not, in any sense, its property. We are not to assume that this was done, as it is not enjoined by the Revenue act, and would be in clear violation of the duty imposed on the board. It appears from the resolutions that the object was to assess the capital stock and franchises of corporations as is directed by the fourth clause of the third section of the Revenue act, and the assessment is, in fact, on the capital stock, including the franchise. The averment in the bill in this respect is contradicted by the exhibit. There is a seeming injustice in taxing corporations which are largely indebted and whose earnings are insufficient to pay the accruing interest, as is alleged to be the fact in the present case, to the full extent of the value of all their property and privileges, without regard to their indebtedness; yet it has never been the policy of the legislature to make any discrimination in favor of individuals on this account, and corporations cannot claim an exemption from taxation when, under like circumstances, an individual would not also be exempt to the same extent. The mode of valuation

adopted by the board of equalization assumes, first, that the value of the aggregate shares of capital stock is equal to the value of all the property, including the franchise, belonging to the corporation, when it is not indebted; second, that when the corporation is indebted the indebtedness proportionally reduces the value of the shares of capital stock; third, that the value of the debt is determined by the value of that belonging to the corporation from which its payment can be enforced, so that, however great the nominal amount of the debt, its actual value can never exceed that sum. To illustrate: Where a corporation is free from debt and the aggregate value of its shares of stock is, say, \$150,000, it is assumed that the value of its capital stock, including its franchise, is \$150,000. If the same corporation, still retaining the same property, is, however, indebted \$50,000, this will reduce the aggregate value of its shares of stock to \$100,000, but as the law does not exempt corporations or individuals from the payment of taxes on account of indebtedness it would not be accurate to tax the corporation at this amount, because to do so would be to exempt it to the extent of its indebtedness. To ascertain, therefore, what would be the aggregate value of its shares of stock if the corporation were free from debt, it is necessary to add the value of the debt to the value of the shares of stock. If the corporation is, in the given case, indebted \$150,000, the shares of stock will be worth nothing but the value of the debt will be \$150,000, which is the value of that from which its payment can be enforced; and so, if the corporation is indebted in any greater sum, the value of the debt will still be only \$150,000."

In *Pacific Hotel Co. v. Lieb*, 83 Ill. 602, the same learned justice, on page 610, says: "The words 'capital stock,' as used in the Revenue law, we have held in *Porter v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561, and in other subsequent cases where the question has been before us, mean the property belonging to the

corporation; and we have also held in those cases that it was designed by the law that all that belongs to the corporation as its property, whether tangible or intangible and of whatever nature or kind, should be valued, under this designation, for the purpose of taxation. The assessed valuation of the tangible property is deducted to avoid double taxation, and when this is done the residue apparently represents only the valuation of the intangible property. But this is only apparently so, for in reality it may represent also tangible property not represented by the valuation deducted. If there be property belonging to the corporation which adds to the value of the shares of stock and the value of the debts of the corporation, and which has been omitted in the assessment of the tangible property, it, as well as the intangible property, would be represented in the balance remaining after deducting the assessed value of the tangible property. So, also, this balance might represent an excess over the assessed value of the tangible property should it be assessed at a less sum than is represented as its value, in connection with the franchise, by means of the value of the shares of stock or the value of the debts. The double valuation being avoided, however, by the deduction of the assessed valuation of the tangible property, the corporation suffers no injustice whether the balance entirely represents the value of intangible property, or whether it also, in part, represents the value of the tangible property. The object is to reach the capital stock or property of the corporation as an entirety,—the tangible and intangible values combined.”

And in the *Tax cases*, reported in 2 Otto, 575, Mr. Justice Miller, speaking for the court, says: “It is * * * obvious that when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it,

ascertained the true value of the road,—all its property, its capital stock and its franchises,—for these are all represented by the value of its bonded debt and of the shares of its capital stock.”

In the first proposition of law above set forth, the holding of the court was to the effect that in making the assessment of the capital stock of corporations, including franchises, it is proper to add the market or fair cash value of the capital stock to the market or fair cash value of the debt of the corporation, (excluding from such debt the indebtedness for current expenses,) and to deduct from the result the aggregate amount of the equalized or assessed valuation of all the tangible property of said corporation, and one-fifth of the remainder would be the net assessed valuation of the capital stock, including franchise, over and above the assessment of its tangible property. The method thus pointed out of obtaining the cash value of the capital stock, including franchises, of corporations for the purpose of taxation has been in force in this State for many years, and has been approved by the courts, both State and national, and was a proper rule for the board to follow in assessing the capital stock, including franchises, of corporations for the purpose of taxation. We are of the opinion the court did not err in holding said proposition to fairly state a rule of law applicable to this case.

The second proposition challenges the method provided in the rules adopted on the 22d day of November, 1900, for obtaining the fair cash value of capital stock, including the franchises, over and above the equalized or assessed valuation of the tangible property, for the purposes of taxation. Such rules entirely eliminate from such consideration the indebtedness of the corporation to be taxed. This should not be done, as the cash value of the capital stock, including franchises, of a corporation cannot be obtained without taking into consideration the element of debt. They also provide that the

amount paid to any municipality as compensation for the use of its franchise privileges in such municipality shall be taken into consideration. Such outlay is but a current expense, and should no more be taken into consideration in determining such question of value than interest or labor. The rules adopted on the 22d day of November are declared to be the only existing rules and principles in force for the government of the board in making the assessment of the capital stock of companies or associations. There should therefore have been included within their terms everything necessary to be considered by the board in order that a correct valuation might be reached, and there should have been included within their terms no element which was not proper for the board to consider in making such assessment. As they exclude the question of the debts of the corporation from the consideration of the board and provide that items of mere current expenses shall be taken into consideration in making such estimate, they do not present a correct and lawful method of determining the assessed valuation of the capital stock of corporations, including the franchises, over and above the equalized or assessed valuation of the tangible property, and the court did not err in holding said proposition to be the law.

The respondents submitted sixteen propositions in writing, which the court was asked to hold as the law of this case. The court held six and refused ten of said propositions. The propositions held by the court upon behalf of the petitioner and the relators we think fairly stated the law of this case, and the court committed no error in holding or refusing to hold propositions of law.

It is urged by counsel for the respondents, with great earnestness, that there is no evidence in this record to sustain the judgment. The evidence offered on behalf of the petitioner, when considered alone, in our judgment fully sustains the findings and judgment of the trial court. To meet the case made by the petitioner the re-

spondents introduced no evidence, their insistence being that the petitioner had failed to make a case; that the petition was prematurely filed; that the judgment was rendered too late, and that, in any event, the court was without jurisdiction to review the action of the State Board of Equalization or to coerce it by writ of *mandamus*. This is a civil suit, and the members of the board were competent witnesses, and if it were true that the capital stock, including franchises, of said corporations were about to be or had been fairly and honestly valued and assessed, it would have been an easy matter for them to have explained to the court the methods pursued by them in reaching the results which they obtained, and to have shown to the court that such results were proper and legal. The respondents, however, saw fit to rest their case upon the law and to entirely ignore the facts, and we are of the opinion that the court, upon this record, not only properly held the law, but also the facts, against them.

It is further contended that the judgment of the court awarding the writ is too general, and therefore void. The order and judgment of the court, omitting the formal part, is as follows: "And it is further considered and directed by the court that you, the said State board, and the members thereof, be and you are hereby commanded to convene forthwith at the capitol building, in the county of Sangamon, and that you there forthwith value and assess the capital stock, including the franchise, of each of said companies herein named, as of April 1, 1900, in the manner provided by law, so as to ascertain and determine, respectively, as to each of said corporations, the fair cash value of its capital stock, including its franchise, over and above the assessed value of the tangible property of such company, for the year 1900. And it is further ordered that in arriving at such valuations and assessments of the capital stock, including the franchises of said companies hereinbefore named, said board,

and each member thereof, shall, from the best information obtainable by it and them, ascertain and take into consideration, among other things, as to each said corporation as the same was on the first day of April, 1900, the market value, or if no market value, then the fair cash value, of its shares of stock and the total amount of all its indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or the improvement of property and the assessed or equalized valuation of all tangible property of said corporations, respectively, on said April 1, 1900. And you are further commanded to direct the respective assessments so made to be certified by the said Auditor of Public Accounts to the county clerk of Cook county, that the taxes for all purposes thereon may be extended by said clerk for the year 1900. You are further commanded to make return to this court on the 12th day of June, A. D. 1901, in what manner you have complied with this order." The court does not, by its said order and judgment, undertake to control the discretion or judgment of the respondents in the valuation or assessment of the capital stock, including the franchises, of said corporations. It only lays down the rules of law which govern and the methods which should be pursued by the respondents in making such valuation and assessment. This we think proper.

We have been asked by the petitioner to fix the date when a return to the writ should be made. Such order is not necessary. Under section 82 of the Practice act, upon filing in the trial court a certified copy of the order of affirmance the same will operate as a *procedendo*, and that court will become re-invested with jurisdiction, and may proceed as though no appeal had been taken. *Smith v. Stevens*, 133 Ill. 183.

Finding no reversible error in this record the judgment of the circuit court will be affirmed.

Judgment affirmed.

HELEN M. GARDNER *et al.*

v.

MORRIS COHN *et al.*

Opinion filed October 24, 1901.

1. **MORTGAGES**—*when record of mortgage is sufficiently certain to be constructive notice.* The record of a mortgage is sufficiently certain to be constructive notice even though the amount of the note secured is not expressly stated, where the note is in other respects identified and the rate of interest is specified, together with the number and amount of each interest coupon and the respective dates for their payment.

2. **EQUITY**—*when cross-bill is unnecessary.* On bill to foreclose a mortgage, if the answers of the various parties claim liens, the court has power, without the filing of a cross-bill, to determine the existence and priority of the various liens, and to order the premises sold and the proceeds distributed in discharge of such liens according to priority.

3. **SAME**—*failure of foreclosure decree to specify time for paying amount due is not reversible error.* Failure of a foreclosure decree to specify a period of time within which the defendant might pay the amount found due before the master could advertise the premises for sale is not reversible error, since the allowance of such time is not required by statute but is in the discretion of the chancellor; but such practice is not approved.

Gardner v. Cohn, 95 Ill. App. 26, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. R. W. HILSCHER, Judge, presiding.

EDDY, HALEY & MUNROE, for appellants:

A subsequent or second mortgagee, without actual notice of the existence of a prior mortgage, is charged with only such notice as the record contains. *Bullock v. Battenhausen*, 108 Ill. 28.

The description of a mortgage debt must be correct as far as it goes. 15 Am. & Eng. Ency. of Law, 76; Jones on Mortgages, (5th ed.) sec. 70; *Jewel v. President*, 27 Me. 400; *Clay v. Owen*, 81 Mass. 521.

A mortgage is required to disclose, with as much certainty as possible, the real character of the indebtedness. If it is given to secure an existing or future liability, the foundation of such liability should be set forth. *Bank v. Godfrey*, 23 Ill. 552.

The debt is the principal thing and the mortgage the mere incident. If the principal thing is void or inoperative so will be the incident. *Ogden v. Ogden*, 180 Ill. 543; *Lucas v. Harris*, 20 id. 169; *Coffing v. Taylor*, 16 id. 472; *Ryan v. Dunlap*, 18 id. 743; *Warner v. Helm*, 1 Gilm. 231.

CHARLES B. CHEADLE, for appellees:

It is sufficient if the amount of the debt secured can be ascertained or inferred from the record. *Battenhausen v. Bullock*, 11 Ill. App. 668; *Bramhall v. Flood*, 41 Conn. 71; *Booth v. Barnum*, 9 id. 286; *Miller v. Rouser*, 25 Ill. App. 90.

In the description of the debt substantial accuracy is all that is required. It must be correct as far as it goes, and must be full enough to direct attention to the sources of correct information, and must be such as not to mislead or deceive as to the nature and amount of the debt. *Goff v. Price*, 42 W. Va. 384.

The record of a mortgage is constructive notice of whatever appears on its face or may be inferred therefrom. *Bullock v. Battenhausen*, 11 Ill. App. 668; 108 Ill. 28; *Bergman v. Bogda*, 46 Ill. App. 357.

Whatever puts a party on inquiry amounts, in law, to notice, provided the inquiry becomes a duty, and would lead to knowledge of the requisite fact by the exercise of ordinary diligence and understanding. *Bank v. Dayton*, 116 Ill. 264; *Bank v. Parsons*, 54 Minn. 56; *Hunter v. Stoneburner*, 92 Ill. 75.

Mr. JUSTICE BOGGS delivered the opinion of the court:

As between appellees and the appellant Mrs. Helen M. Gardner, the important question to be determined is whether the record of a certain mortgage on real estate

in Will county, Illinois, given to the appellees by Goodman Greenbaum and Carrie Greenbaum, his wife, on the 12th day of January, 1894, and filed for record in the office of the recorder of deeds of said Will county on the 16th day of January, 1894, is the superior lien to a mortgage on the same real estate executed by the same mortgagors to the said Helen M. Gardner on the 8th day of February, 1896, and duly recorded on the same day.

In the mortgage given to the appellees the indebtedness intended to be secured by it is described as follows: "To secure the payment of one certain promissory note executed by said Goodman Greenbaum, bearing even date herewith, payable to the order of said Morris Cohn and Harris Cohn two years after date, with interest at the rate of seven per cent per annum, payable every three months, said interest being also evidenced by eight coupon notes attached to said principal note and numbered from 2 to 9, inclusive, each being for the sum of \$105, and payable, respectively, on the 12th day of April, July, October, 1894, and January, April, July and October, 1895, and January, 1896." It will be noted the sum of money to be paid is not expressly stated in the description of the indebtedness in the mortgage.

The appellant Mrs. Gardner had no actual notice of the mortgage given by said Greenbaum and wife to appellees, and the contention upon her part is, that the statement of the indebtedness incorporated in the mortgage as intended to be secured thereby is so uncertain and indefinite that the record of the mortgage did not operate to charge her with constructive notice thereof. The description in the mortgage of the indebtedness intended to be secured thereby was sufficiently certain to inform the appellant Mrs. Gardner that such indebtedness was evidenced by a note which the mortgagor, Goodman Greenbaum, had executed to the appellees, Morris and Harris Cohn; that the note was of even date with

the mortgage, namely, the 12th day of January, 1894, and would fall due in two years thereafter; that according to the tenor of the note the sum of money for which the note was given bore interest at the rate of seven per cent per annum, payable quarter yearly, and that said quarter yearly payments of interest would amount to the sum of \$105 each. The principal of the note was not expressly stated, but it was wholly unnecessary inquiry *aliunde* the description given in the mortgage should be made in order to ascertain such principal sum. The description contained the data necessary to a very simple computation which would disclose the amount of the indebtedness. The principal of the note was the sum upon which interest at the rate of seven per cent per annum would amount to \$105 in three months, or \$420 in one year. Everything necessary to define the nature of the mortgage indebtedness was accurately set forth in the record of the mortgage, so that another indebtedness could not have been substituted for it. Nothing in the description given in the record tended to deceive or mislead, and the description, within itself, recited facts which disclosed the amount of the encumbrance created by the mortgage with no less certainty than had such amount been expressly stated. The chancellor correctly ruled the record of the mortgage carried notice to the appellant Mrs. Gardner of the lien created by the execution of the instrument.

The proceeding was a bill in chancery by the appellees to foreclose the mortgage given to them, the appellants being defendants to the bill. The appellant Mrs. Gardner filed an answer and a cross-bill. The answer alleged the said Greenbaum and wife were indebted to the respondent, Mrs. Gardner, in the sum of \$1000, and to secure the same, together with interest at the rate of five per cent thereon until paid, on the 8th day of February, 1896, executed and duly acknowledged and delivered to her a mortgage on the same premises described

in the mortgage given by the same mortgagors to the appellees; that appellant Mrs. Gardner accepted said mortgage to her without actual notice of the prior mortgage to the appellees, and averred the record of said mortgage to appellees did not, for the alleged reasons hereinbefore discussed, charge her with constructive notice thereof, and that her mortgage constituted a valid and subsisting prior lien upon the premises, and that said indebtedness to her so secured was due and unpaid. The allegations of the cross-bill were, in substance, the same as the answer, and the cross-bill differed from the answer only in that it concluded with a prayer for a decree establishing the amount of the mortgage indebtedness to her as the prior lien upon the premises, and for a decree of foreclosure and sale of the premises and payment of the amount due her out of the proceeds of the sale. The chancellor established the lien of the mortgage given to the appellees as the prior lien on the premises, ordered the cross-bill filed by the appellant Mrs. Gardner be dismissed, and decreed the sale of the premises to be made by the master and the application of the proceeds of the sale to the payment of the amount found due the appellees and the costs of the proceeding, and directed the surplus to be brought into court to be distributed to or among the appellants, as secondary lienholders, according to the priority of their liens as subsequently should be determined by the court. The Appellate Court for the Second District affirmed the decree, and Mrs. Gardner and Goodman Greenbaum have perfected this their appeal to this court.

It is urged it was error to dismiss the cross-bill for the reason that, even if Mrs. Gardner's mortgage was but a secondary lien, she was entitled to share in any surplus of the proceeds of the sale of the real estate remaining after appellees' mortgage and the costs of the proceeding had been satisfied, and the contention is, a cross-bill was necessary to entitle her to a decree affirmatively

awarding her a portion or all such surplus. The cross-bill was unnecessary and was properly dismissed. Under the original bill and the answer of Mrs. Gardner and the other defendants to the bill who claimed to hold liens against the premises, the court had full authority to determine the existence and priority of the various liens and to order the premises sold, and the funds thus produced by the sale to be distributed in discharge of such liens according to their priority. *Soles v. Sheppard*, 99 Ill. 616; *Boone v. Clark*, 129 id. 466.

The remaining contention raised upon the record is that of the appellant Greenbaum, the mortgagor, namely, that the court erred in failing to allow and specify in the decree a period of time within which he could pay the amounts found to be due by the decree before the master should have authority to advertise the premises for sale. It is the usual and the better practice to incorporate such a provision in a decree, but there is no statutory requirement that it shall be done, and we think it a matter resting in the discretion of the chancellor. (2 Jones on Mortgages,—2d ed.—sec. 1586.) The decree directed the master to give three weeks' notice of the time and place of sale before making such sale, and recognized and provided for the right of redemption from the sale in accordance with the provisions of the statute on the subject. The decree debt and costs could have been paid at any time within the period provided by the decree for the giving of the notice of the sale. We see nothing in the case to indicate the failure of the chancellor to incorporate an order in the decree granting time in which to pay the decree debt and costs before the master should be authorized to advertise the property for sale was an abuse of the discretion vested in him. Nor is it suggested there was an abuse of discretion, but the insistence is, the omission was error absolute and reversible in character. While loth to tolerate any departure from the established practice, we do not regard the omission as neces-

sarily fatal to the decree, and decline in this instance to reverse for that reason alone. We note, however, our disapproval of the failure to observe the usual practice.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

GRIZELDA P. HOUSTON

v.

THE CITY OF CHICAGO.

191	559
202	461

Opinion filed October 24, 1901.

1. SPECIAL ASSESSMENTS—*matters of description are certain in law if capable of ascertainment by computation.* Matters of description in a special assessment ordinance are certain in law if they may be rendered certain by simple computation from data given.

2. SAME—*requirements of confirmation petition under section 37 of the act of 1897.* Under section 37 of the Local Improvement act of 1897 a confirmation petition need only identify the ordinance by proper reference, and incorporate it, together with the recommendation of the board of local improvements, both duly certified, either by attaching them or filing the same therewith, and conclude with a prayer for the assessment in accordance with the ordinance.

3. SAME—*jury do not try the issue as to the necessity for the improvement.* On the hearing of the issue of benefits before the jury in confirmation proceedings it is proper to sustain an objection to a question calling for the opinion of the witness as to the necessity for the improvement.

APPEAL from the County Court of Cook county; the Hon. R. H. LOVETT, Judge, presiding.

MASON BROS., (HENRY E. MASON, of counsel,) for appellant.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and DENIS E. SULLIVAN, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is a special assessment proceeding for the improvement of North Fortieth avenue, in the city of Chicago, from the north curb line of West Lake street to a

line parallel with and one hundred and sixty-two feet south of the south line of West Kinzie street, by curbing and grading the same and paving the roadway of the street between said points with vitrified brick.

On September 25, 1899, the board of local improvements submitted to the city council an estimate of the proposed improvement, and also an ordinance providing for the proposed improvement, accompanied by a recommendation that the improvement be made. This ordinance, in the first paragraph of its first section, provides: "That roadway of North Fortieth avenue, from the north curb line of West Lake street to a line parallel with and one hundred and sixty-two feet south of the south line of West Kinzie street, said roadway being thirty-eight feet in width, and also the roadways of all intersecting streets and alleys extended, from the curb line to the street line produced, on each side of said North Fortieth avenue between said points, be and the same are ordered improved," etc. But the width of the roadways of these intersecting streets and alleys is not fixed in this first paragraph, nor in the other places in this ordinance where these roadways are referred to. The ordinance provides that limestone curbs four feet long, three feet deep and five inches thick, after being dressed, etc., shall be firmly bedded on flat limestone blocks of one foot in length, eight inches in width and six inches in thickness. The ordinance was passed and the estimate approved by the council, and on November 9, 1899, the corporation counsel filed a petition in the county court of Cook county, which set out that on the 25th of September, 1899, the city council did pass an ordinance providing that North Fortieth avenue, from the north curb line of West Lake street to a line parallel with and one hundred and sixty-two feet south of the south line of Kinzie street, be curbed, graded and paved with vitrified brick. A copy of the ordinance and the recommendation of the board of local improvements, and of the estimate

of the cost of the improvement as approved by the city council, duly certified by the city clerk, was attached to and made a part of the petition, with a prayer that steps be taken to levy a special assessment for said improvement. Section 2 of the ordinance approved the recommendation of the board of local improvements and the estimate of costs by the engineer. Appellant interposed fifteen objections to the confirmation of the assessment, among which was, that the property was assessed in excess of the benefit to be derived by it. All these objections but the one last named were overruled, and a jury was empaneled and a trial had on that objection. The jury found that the cost did not exceed the benefits, and the assessment was confirmed.

Appellant relies in her brief upon five grounds of error. We will discuss and dispose of them in their order.

First—It is contended that the ordinance is invalid because it does not fix the width of the intersecting streets. The improvement was on Fortieth avenue, and consisted of limestone curbs to be bedded on flat limestone rocks. The street was to be paved with vitrified brick. By the ordinance the datum is fixed for the grade, and the pavement of the main roadway of Fortieth avenue was to be nineteen feet on each side of the center, making a roadway of thirty-eight feet. At the intersecting streets the curb was to turn on the curb line and run back to the street line of Fortieth avenue, and at the alleys the curb was to run to the alley line produced. Thus the alleys were to be paved the full width of the alleys from the curb line to the street line of Fortieth avenue, and the intersecting streets to be paved from the street line of Fortieth avenue out to the curb line, so that the whole of Fortieth avenue, so far as this improvement extended, was to be paved, except so much as was to be taken up by sidewalks and curb.

This same objection has been urged many times in this court. The latest case reported is *Givins v. City of*

Chicago, 188 Ill. 348. Discussing this objection, on page 355 of that Report we say: "It is also contended that the ordinance is defective in its description of the parts of streets to be improved, in this: that it does not state the width of what is called the 'wings,' at the intersections to be improved. The width of these wings would depend on the width of the sidewalk of the intersecting street, and it is said that there is nothing in the record to show what the width of the sidewalk on any of the intersecting streets is. The sidewalks were not to be paved, and the width of the wings so to be paved is a matter of easy ascertainment, as said in *County of Adams v. City of Quincy*, 130 Ill. 566. See, also, *Woods v. City of Chicago*, 135 Ill. 582; *People v. Markley*, 166 id. 48." As in that case, we are of the opinion "there is no such uncertainty or indefiniteness in the description as to justify a reversal on that ground."

Second—"The ordinance is invalid because it does not provide for the number or quantity of flat limestone blocks upon which the curb-stones are to be bedded." We have already shown that the dimensions of the curb-stones and the flat stones are fully set forth in the ordinance, and it is a mere matter of calculation to determine the number of flat rocks of the dimensions given for the beds for this curb. The case comes fairly within the commonly accepted rule that whatever may be made certain by simple computation is certain within the meaning of the law. We hold this objection not well taken.

Third—"The petition is informal and does not show that the preliminary steps required by law have been taken, in that it does not affirmatively allege that the ordinance for the proposed improvement has ever been recommended to the city council of the city of Chicago for passage by the board of local improvements; that an estimate of the costs of such improvement has ever been made by the engineer of said board or that such estimate has ever been approved by said council,"—and it is

insisted that these matters are jurisdictional. This is a purely statutory proceeding, and is not controlled by the ordinary rules of practice and procedure in courts. Section 37 of the act of 1897 provides: "Upon the passage of any ordinance for a local improvement pursuant thereto, it shall be the duty of the officer specified therein to file a petition in some court of record in said county, in the name of such municipality, praying that steps may be taken to levy a special assessment for the said improvement, in accordance with the provisions of the said ordinance. * * * There shall be attached to or filed with such petition a copy of the said ordinance, certified by the clerk, under corporate seal; also a copy of the recommendation of the board of local improvements, and of the estimate of the cost, as approved by the legislative body. The failure to file any, or either of said copies, shall not affect the jurisdiction of the court to proceed in said cause, and to act upon said petition; but if it shall appear in any such cause that such copies have not been attached to or filed with said petition before the filing of the assessment roll therein, then, upon motion of any objector for that purpose, on or before appearance day in said cause, the entire petition and proceeding shall be dismissed." (Hurd's Stat. 1899, p. 369.)

As we interpret this section the petition need only identify the ordinance by proper reference, and incorporate it, together with the recommendation of the board of local improvements, both duly certified, either by attaching to or filing the same therewith, and conclude with the prayer that steps be taken to levy the special assessment for said improvement in accordance with the provisions of said ordinance. This was precisely what was done in the case at bar. Inasmuch as the ordinance and recommendation were both to be made a part of the petition by being filed with or attached to it, the legislature, in prescribing the contents of the petition, doubtless deemed it, as we do, useless to require that the various

provisions of the ordinance and various elements of the recommendation should first be set out in the petition and then accompanied by certified copies of each. Prior to the act of 1897 the statute required that the petition should *recite* the ordinance for the proposed improvement and the report of such commission, and we held in *Foss v. City of Chicago*, 184 Ill. 436: "The ordinance might be recited by repeating it in the body of the petition or by attaching a copy and making it a part thereof. * * * We regard the attaching of a copy and making it a part of the petition as a good recital." We think this petition was a proper compliance with the requirements of the statute.

Fourth—"The witness Birkhoff should have been allowed to give his reasons why such a pavement as the proposed improvement is not necessary on Fortieth avenue." Section 49 of the act of 1879 (Hurd's Stat. 1899, p. 373,) specifically provides what shall be submitted to the jury, *i. e.*: "If it be objected on the part of any property assessed for such improvement, that it will not be benefited thereby to the amount assessed thereon, and that it is assessed more than its proportionate share of the cost of such improvement, * * * the court shall empanel a jury to try the said issue." Thus it will be seen that it is not within the province of a jury at this hearing to pass upon the necessity of the proposed improvement.

The witness Birkhoff was examined very fully as to the particular property of the appellant and all other property affected by the proposed improvement, giving its location, character, whether business or residence; the extent of settlement; the kind and cost of buildings; the extent of travel along this street and the value of the lots. He told that he was a real estate dealer; a member of the real estate board; the length of time he was in the business and the extent of his acquaintance with the property in this neighborhood; that he had this particular property for sale; at what he was offering it; that

he had paid the taxes on it for thirty years; that in his opinion the benefits to the property would not exceed three dollars per front foot, or \$75 for the lot, and that the assessment was equivalent to about seven dollars per front foot. He was then asked:

Q. "Is there any other facts which you can take up?"

A. "I can give my reasons why such pavement is not necessary on this street.

Q. "Let us have them."

This question was objected to; objection sustained, and the appellant excepted. This was the only question to which an objection was allowed where exception was taken. We think great liberality was allowed in the examination of this and the other witness for the objector, and that the court properly sustained the objection to this question.

Fifth—"The verdict was clearly against the weight of the evidence and should have been set aside." We have carefully examined the evidence and are unable to say that the weight of it is with the appellant. Two witnesses testified on each side. Birkhoff and Givins, for the appellant, each testified that his estimate of the benefits was from three dollars to three dollars and a half per front foot, and Snelling and Haynes, for appellee, testified that the lots would be benefited to the extent of eight dollars per front foot, or an average of \$200 for each lot, and that by the improvement their value would be increased that much. Here was a square conflict in the testimony, which it was the peculiar province of a jury to reconcile, if they could, and if they could not, to determine where credence should be given, and we can not say the verdict is so manifestly against the weight of the evidence that we will be warranted in disturbing it.

The judgment of the county court of Cook county is affirmed.

Judgment affirmed.

JOHN ROBSON,

v.

EDWARD DOYLE.

Opinion filed October 24, 1901.

1. **BILLS OF DISCOVERY**—*bill in aid of suit at law need not aver that evidence is known only to defendant.* A bill which is filed purely for discovery in aid of a suit at law need only aver that the evidence will aid the complainant in his suit at law, and need not allege that the evidence is known to the defendant alone.

2. **SAME**—*a bill of discovery calling upon the defendant to convict himself cannot be maintained.* *Qui tam* actions brought under the penal statute against gambling, by an informer, who sues for treble the amount lost to the defendant by third persons, are criminal prosecutions although civil in form, and a bill of discovery in aid of such actions, calling upon the defendant to furnish the names of the losers and amounts lost, to enable the complainant to successfully prosecute his suits at law, cannot be maintained.

3. **SAME**—*section 137 of Criminal Code, concerning bills of discovery, construed.* Section 137 of division 1 of the Criminal Code, which provides that in actions commenced under the provisions against gambling the party shall be entitled to discovery as in other actions, and all persons shall be obliged to answer bills preferred against them for the discovery of money won by them, applies only to cases where the party seeking discovery is the original loser, and not to *qui tam* actions by informers to recover penalties.

Robson v. Doyle, 94 Ill. App. 281, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

HENRY S. MONROE, for appellant.

GEORGE W. PLUMMER, and WHARTON PLUMMER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Edward Doyle, filed his bill in this case in the circuit court of Cook county against the appellant, John Robson, for a discovery in aid of two suits brought

191	566
101a	*592
191	566
198	*287

by the appellee for the use of himself and the county of Cook, against appellant, to recover penalties imposed by the statute for gambling, and other like suits which appellee intended to bring as soon as he could ascertain the facts to base them on. The discovery prayed for related to alleged gambling transactions between appellant, on the one part, and James B. Dutch, Alexander Geddes and other persons unknown to appellee, on the other part. The bill was demurred to. The demurrer being overruled, appellant elected to stand by it, and he was ordered to answer the bill and the interrogatories therein propounded to him. He prayed an appeal to the Appellate Court for the First District, where the decree was affirmed.

The allegations of the bill are, that during the last three years the defendant has been engaged in carrying on the business of gambling in puts and calls on wheat, in violation of the Criminal Code of this State; that during said period he negotiated sales of such puts and calls to one James B. Dutch and one Alexander Geddes, and a large number of other persons whose names are unknown to complainant; that on June 4, 1900, complainant, suing as well for the county of Cook as for himself, brought two suits at law in said circuit court against the defendant, to recover the statutory penalty of three times the several sums of money lost by said Dutch and Geddes and paid to the defendant; that complainant intends to commence similar actions against the defendant to recover three times the amount of money won by the sale of puts and calls on wheat by the defendant from other persons, as soon as complainant can ascertain the names of such persons and the amounts of money won; that the transactions mentioned in the declarations, and those had with other unknown persons, are largely within the exclusive knowledge of the defendant and Dutch, Geddes and other persons unknown, and that it is important to complainant to obtain a discovery thereof to enable him

to establish the causes of action in the suits commenced and to recover in other suits to be commenced when he obtains the facts. The declarations in the two suits are set out in the bill *in hæc verba*. In one it is averred that the defendant won from said Alexander Geddes \$50,000 on puts and calls; that Geddes did not, within six months from the time he paid to the defendant said moneys, bring suit to recover the same, whereby, by force of the statute, an action accrued to the plaintiff to have and recover to said county of Cook and himself the sum of \$150,000, being three times the amount of the several sums of money lost by said Alexander Geddes and paid to the defendant. The other declaration is of the same character, alleging losses by James B. Dutch amounting to \$50,000, which he did not sue for within six months, whereby an action accrued to the plaintiff, for the use of himself and the county of Cook, for \$150,000, being three times said amount. To the bill are attached one hundred and seventeen interrogatories, covering the alleged transactions with Dutch and with Geddes and with all other unknown persons to whom defendant has negotiated the sale of any puts or calls, and asking for the names of such person or persons and the amounts of money paid to defendant.

It is first contended that the bill is insufficient to call for an answer on account of a failure to set forth that the facts alleged in the declarations in the suits at law are true. The allegations of the bill are sufficient in that respect, and show the existence of the facts and that complainant expects to prove them by the defendant. But they are made and sworn to upon information and belief. The transactions were not with the complainant, and it is apparent that his information must have been derived from others. We do not think the bill subject to the objection.

It is also claimed that if complainant has other evidence besides that of defendant the bill cannot be sustained, and, therefore, it is bad for a failure to show that

the evidence rests exclusively with the defendant. The bill does not aver that the facts are known to no other person than the defendant, and in *Vennum v. Davis*, 35 Ill. 568, it was held that such an averment was necessary to a bill for discovery and final relief. The rule is different in a bill which is filed purely for discovery in aid of a suit at law. In such a case it is sufficient to aver that the evidence will aid the complainant in the suit at law. 6 Ency. of Pl. & Pr. 733; Story's Eq. Jur. sec. 74a; *Marsh v. Davison*, 9 Paige, 580.

So far as the bill is filed to obtain evidence for the purpose of commencing suits in the future and recovering penalties from the defendant it is bad beyond all question. That part of the bill not only seeks to compel the defendant to disclose a cause of action against himself for penalties for transgressing the law where the bill shows no cause of action whatever, but it is purely a fishing bill so far as it seeks such a discovery. It does not seem to be contended that the bill in that respect is authorized by any principle of the law or any statutory provision.

The suits already brought by the complainant are *qui tam* actions under the penal statute forbidding gambling on pain of forfeiting a penalty of three times the amount won, if the person who has lost the money does not sue for it within six months. One-half of the penalty is given to the county and the other half to the informer who brings the suit. The statute provides that any person who has lost, by gambling, money or other valuable thing amounting in the whole to the sum of \$10, shall be at liberty to sue for and recover the same or the full value thereof, and in case he shall not, within six months, really and *bona fide*, and without covin or collusion, sue and with effect prosecute for such money or other thing, it shall be lawful for any person to sue for and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case,

one-half to the use of the county and the other half to the person suing. The suits at law are not for the recovery of anything which the complainant has lost or paid, but are purely prosecutions in special actions on the case for penalties for violations of the penal code. The purpose of the discovery asked for is to enable the plaintiff to maintain the prosecution and recover the penalties. The very purpose of the discovery is to subject the defendant to the penalties prescribed by the statute and with the sole object of recovering such penalties. Now, courts of equity have always withheld their aid in actions which were penal in their nature, and would never compel a defendant to disclose facts which would expose him to criminal punishment or prosecution, or to pains, penalties, fines or forfeitures. A defendant may refuse to answer, not only as to facts directly criminating him, but as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty or forfeiture. (1 Daniel's Ch. Pr. 561-569; 2 id. 1557; 1 Pomeroy's Eq. Jur. secs. 196, 202; 6 Ency. of Pl. & Pr. 742, 744.) This was the settled rule of the English courts of equity, and the principle was made a part of our fundamental law in the State and Federal constitutions. It makes no difference that the suits brought by complainant are civil in form. They are brought for penalties for alleged offenses against the laws of the State, and are criminal cases within the meaning of the constitutional provision. (*Boyd v. United States*, 116 U. S. 746.) They are criminal prosecutions, in aid of which the plaintiff, by bill for discovery, calls upon the defendant to convict himself, and the rules of equity, as well as the State and Federal constitutions, forbid such proceedings.

It is claimed, however, the bill is authorized by section 137 of the Criminal Code. (Hurd's Stat. 1899, p. 592.) That section is as follows: "In all actions or other proceedings commenced or prosecuted under the provisions of sections 126 to 135 inclusive of this division, the party

shall be entitled to discovery as in other actions, and all persons shall be obliged and compelled to answer, upon oath, such bills as shall be preferred against them for discovering the sum of money or other thing so won as aforesaid. Upon the discovery and re-payment of the money or other thing so to be discovered and re-paid, the person who shall discover and re-pay the same, as aforesaid, shall be acquitted, indemnified and discharged from any other or further punishment, forfeiture or penalty which he might have incurred, by the playing for, or winning such money, or other thing, so discovered or re-paid as aforesaid."

In *Lamson v. Boyden*, 160 Ill. 613, we said that said section would be an unconstitutional enactment if so construed as to compel a party to answer questions which might subject him to a criminal prosecution, but it is insisted that the validity of the statute cannot be questioned in this suit because the appeal was taken from the decree of the circuit court to the Appellate Court, which had no jurisdiction of that question. The question whether the statute has any validity or could be effective in any case was waived by the appeal to the Appellate Court. But we do not understand it to be claimed that the statute is void, but that it should not be construed to sustain this bill. It is conceded to be valid in certain classes of cases, and the Appellate Court had jurisdiction to construe the statute and decide whether it is applicable to this case. (*State Board of Health v. People*, 181 Ill. 512.) To hold that section 137 was designed to apply to a discovery such as is asked for in this case, would be to impute to the legislature an intention to pass a statute in violation of the plain prohibitions of the State and Federal constitutions, and we should not do so if any other reasonable construction can be adopted. If any reasonable construction can be placed upon the statute by which it will not be in conflict with the fundamental law, and therefore void, it is our duty to so

construe it. (*Town of Middleport v. Aetna Life Ins. Co.* 82 Ill. 562; *People v. Peacock*, 98 id. 172.) The presumed intention of the legislature is to obey the constitution, and if that presumed intention can be found by any reasonable construction of the statute, it will be done.

The first words of the section are broad enough to include the suits brought by complainant, since they are actions under the provisions of the sections mentioned. But the provision is that the party shall be entitled to discovery as in other actions. There is no other action in which a discovery can be compelled which would subject the defendant to a penalty or forfeiture. Courts of equity have never lent their aid to the collection of penalties or enforcement of forfeitures. If the discovery is to be such as a party is entitled to in other actions, it would not include a discovery by which the defendant is called upon to convict himself in a criminal prosecution for a penalty. The section provides that the defendant shall be compelled to answer discovering the sum of money or other thing won, and it is not contended that this provision would not be a valid one where a party sues for losses which he is entitled to recover where the offense is barred by the Statute of Limitations and the conditions are such that the constitution would not be violated by compelling the answer. If it should be construed to require the discovery called for in this case, it would not be such a discovery as is allowed in other actions, but one that has never been allowed in any other action and in direct violation of the constitution. The legislature, having provided for the discovery, attempted to provide for indemnity to the defendant against prosecution. Whether they succeeded according to their intention is not material in discovering what the intention was. The latter part of the section relates to that subject, and in construing it, it is not to be assumed that the legislature would attempt to furnish protection to the defendant in one class of suits authorized by the

section and not in other suits which were intended to be embraced within it. The provision apparently is intended to include every case where a discovery could be required under the section, and it provides, upon the discovery and re-payment of the money or other thing to be discovered and re-paid, the person who shall discover and re-pay the same shall be acquitted, indemnified and discharged from any other punishment, forfeiture or penalty. The suits brought by complainant are not for the discovery and re-payment of money alleged to have been won by the defendant, for that right of action, if it existed, was in Dutch and Geddes. If complainant should recover in his suits it could not be said that the penalties were re-paid to him and the county of Cook. Neither of them paid or lost anything, and the money could only be re-paid to the party who paid it. Complainant's suits are popular actions by an informer for penalties in a special action on the case, and not for the recovery and re-payment of anything which he has lost or which he ever had. The provision for indemnity manifests the intention of the legislature as to what classes of cases are intended to be embraced in the section. It cannot be supposed that they intended to protect the defendant against prosecutions under his disclosure if the loser sued merely for the amount that he had lost, and to furnish no protection if an informer sued for three times the amount. We do not find it necessary to construe the statute so as to bring it in conflict with the constitution, but conclude that the legislative intention was that the discovery should only be such as may be had in other actions for the discovery and re-payment to the loser of money or property or other thing to be discovered and re-paid to the one who lost it.

The judgment of the Appellate Court and the decree of the circuit court are reversed and the cause is remanded to the circuit court, with directions to sustain the demurrer.

Reversed and remanded.

THEODORE S. CHAPMAN, Exr.

v.

ALEXANDER M. CHENEY.

Opinion filed October 24, 1901.

1. **WILLS**—*rule where will is susceptible of two constructions.* When a will is susceptible of either of two constructions without doing violence to the intention of the testator as disclosed by the instrument, one of which would render the will void and the other valid, the latter construction should be adopted.

2. **SAME**—*when limitation over is void for remoteness.* A limitation over to the testator's great-grandchildren upon the contingency of the death of their parent before the age of thirty is void for remoteness, but the devise to the grandchildren is not necessarily thereby rendered void.

3. **SAME**—*devise construed as passing a base or determinable fee.* A devise of the fee simple title to the testator's real estate to his grandchildren, subject to their father's life estate therein, but providing that they shall acquire no interest or estate of inheritance before reaching the age of thirty years, passes a base or determinable fee, which vests in such grandchildren at birth, and which may ripen into a title in fee simple absolute upon their attaining the age of thirty years.

APPEAL from the Circuit Court of Jersey county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

Prentiss D. Cheney, a resident of Jerseyville, in Jersey county, died testate in that city on July 3, 1900, leaving Annette H. Cheney his widow, and Alexander M. Cheney, the appellee, his only son and only heir-at-law. His will, which bore date January 11, 1896, was admitted to probate in said county in August, 1900. The substance of the will is stated in the opinion of the court.

Upon the probate of the will, letters testamentary were granted to appellant, who thereupon qualified and accepted the trust and entered upon the discharge of his duties as executor and trustee under the will. Afterward, on the 17th day of August, 1900, the appellee, Alexander M. Cheney, mentioned in said will and the sole heir of the testator, filed his bill of complaint in the circuit

191	574
206	56

191	574
e211	602
e211	605
e211	609
211	610
211	611
191	574
212	45

court of Jersey county, alleging that certain of the principal provisions of the will (naming them) violate the rule against perpetuities, and are therefore void and should be set aside as of no effect. The bill also asked that a certain deed made by the appellee to the testator in his lifetime be set aside and that the appellant be required to account, and also prayed for general relief. Afterward the bill was amended by eliminating so much of it as called for an accounting and for the setting aside of said deed. The bill, as amended, sought a construction of the will that said provisions alleged to be void for remoteness be declared void and the property thereby attempted to be devised and bequeathed be declared to be intestate estate and to be vested in the complainant, as the only heir of the testator, and for general relief. The widow was made a party, and answered, but there was no controversy as to her interest and none between her and the appellant or appellee. The appellant answered the amended bill, admitting the facts alleged but denying that the will, or any of its provisions, violates the rule against perpetuities, or was or were void. Replication was filed, but the cause was, in effect, heard on the amended bill of appellee and the answer of appellant.

The circuit court, on the hearing, sustained the charges of the bill, and entered a decree whereby it was adjudged that by the seventh paragraph of the will the property devised might be taken out of commerce for a longer period than a life or lives in being and twenty-one years and nine months thereafter, and is therefore void for remoteness; and that the fourth, fifth, sixth, eighth, ninth, tenth, twelfth and fifteenth paragraphs of said will are dependent for their force and validity upon said seventh paragraph, as being a part of a general scheme of the testator for the disposition of his property, and that he did not intend that they should operate unless said seventh paragraph should be valid, and that they are therefore also void; and it was adjudged that the testator died

intestate as to all of his property except that mentioned in the second, third, eleventh and sixteenth paragraphs of the will, and that the complainant was, as heir-at-law, the owner of all of said intestate estate, subject to the payment of legacies, etc.

ED. J. VAUGHN, for appellant:

Courts will, as nearly as possible, view the testament from the standpoint of the testator, and will look at the circumstances under which the testator makes his will, such as the state of his property, of his family, and the like. 2 Jarman on Wills, (6th ed.) 1655, rule 10; *Ingraham v. Ingraham*, 169 Ill. 432.

It is the duty of the court to sustain testamentary dispositions, and render them effective, if it can be done, without violating the inflexible rules of law; and in cases where the language admits of more than one interpretation, that will be preferred which will render the instrument operative. Schouler on Wills, (2d ed.) secs. 488, 489.

Where a vested estate is clearly given in the body of the bequest, vague words following are not to be so construed as to render the bequest contingent. *Roberts v. Roberts*, 140 Ill. 345; 2 Redfield on Wills, (4th ed.) 235, 236.

Where a gift to remainder-men is absolute, neither the fact that their enjoyment is postponed to let in an estate for life, nor that a condition subsequent exists upon the happening of which their estate would be divested, will operate to make the remainder contingent. *Hinrichsen v. Hinrichsen*, 172 Ill. 462.

Where the remainder is given to a class it is vested as to members *in esse*, and as to after-born members the remainder is said to open to let them in and thereby diminish the shares already vested. Such a remainder vests in the after-born members at their birth. *Field v. Peebles*, 180 Ill. 376; *Barclay v. Platt*, 170 id. 385; Gray on Perpetuities, sec. 110; *Harrison v. Weatherby*, 180 Ill. 418; 2 Jarman on Wills, (6th ed.) 168-170.

A remainder in fee to the life tenant's children vests at birth of the first child, subject to being diminished by the birth of other children. *Schaefer v. Schaefer*, 141 Ill. 337; *Barclay v. Platt*, 170 id. 385; *Cheney v. Teese*, 108 id. 473.

When there is a good absolute gift, and the testator goes on in a subsequent clause to modify the gift by directing, etc., and the latter limitation is void for remoteness, the whole modifying clause is disregarded and the donee takes the absolute interest. *Post v. Rohrbach*, 142 Ill. 600; Gray on Perpetuities, secs. 233, 423; 1 Jarman on Wills, 292-294; *Howe v. Hodge*, 152 Ill. 252.

The attempted gift over to the possible great-grandchildren of the testator, if valid, would take effect, if at all, as a conditional limitation designed to divest the estate which is to vest in the grandchildren at their birth. *Church in Brattle Square v. Grant*, 3 Gray, 142; *Society v. Attorney General*, 135 Mass. 285.

Such a contingent ulterior limitation may be held void without impairing other dispositions of the will. *Manice v. Manice*, 43 N. Y. 303; *Tiers v. Tiers*, 98 id. 568; *Outland v. Bowen*, 115 Ind. 150.

O. B. HAMILTON, also for appellant:

The rule which sacrifices the former clause because inconsistent with a later one is never applied, except upon failure to give such construction as renders the whole will effective and allows each provision to stand. *Dickison v. Dickison*, 138 Ill. 546; *Holliday v. Dixon*, 27 id. 84.

The policy of the law favors vested estates. *Knight v. Pottgieser*, 176 Ill. 368; *Hawkins v. Bohling*, 168 id. 219; *Hinrichsen v. Hinrichsen*, 172 id. 465; *Coggins Appeal*, 124 Pa. 36; *Harvard College v. Balch*, 171 Ill. 279; Gray on Perpetuities, secs. 103-107.

If an estate becomes vested within the life of a person in being and twenty-one years and nine months thereafter, though not to be enjoyed in possession until after the time of the running of the rule against perpetuities,

it does not come within the rule, and the remainder is held vested. *Lunt v. Lunt*, 108 Ill. 313; *Scofield v. Olcott*, 120 id. 362; *Hawkins v. Bohling*, 168 id. 219; *Ducker v. Burnham*, 146 id. 17; *Knight v. Pottgieser*, 176 id. 368; *Madison v. Larmon*, 179 id. 65.

In doubtful cases, an interest shall, if it possibly can consistently with other rules of law, be construed to be vested in the first instance, rather than contingent; but if it cannot be so construed to be vested in the first instance, at least it will be construed to be vested as early as possible. 2 *Fearne on Remainders*, (4th Am. ed.) secs. 200, 201, p. 73; secs. 310, 344, 255.

The first part of the seventh clause of the will in controversy in this case, standing alone, vests the fee simple title of all of the testator's property in his grandchildren, share and share alike, to take possession only after the death of his son. The only effect of the proviso in said seventh clause is to qualify the said fee simple estate so given in the first part of that clause, and vest in said grandchildren a base or determinable fee, to terminate upon the death of the grandchild under the age of thirty years, leaving no lawful issue. *Wiggins Ferry Co. v. Railroad Co.* 94 Ill. 93; *Friedman v. Steiner*, 107 id. 125; *Strain v. Sweeny*, 163 id. 603; *Summers v. Smith*, 127 id. 645; *Smith v. Kimball*, 153 id. 368; *Lombard v. Witbeck*, 173 id. 405.

THOMAS F. FERNS, and PATTON, HAMILTON & PATTON, for appellee:

No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. *Gray on Perpetuities*, sec. 201; 1 *Jarman on Wills*, 518-529; *Howe v. Hodge*, 152 Ill. 252; *Lunt v. Lunt*, 108 id. 307; *Bigelow v. Cady*, 171 id. 229; *Rhoads v. Rhoads*, 43 id. 239; *Waldo v. Cummings*, 45 id. 421; *Lawrence v. Smith*, 163 id. 149; *Hart v. Seymour*, 147 id. 598; *Eldred v. Meek*, 183 id. 26.

Where the vesting of a gift to unborn persons is postponed for a fixed time exceeding twenty-one years, the gift is void. 1 Jarman on Wills, 518-529; Gray on Perpetuities, chap. 10, sec. 373.

It is not enough that a contingent event may happen, or will probably happen, within the limits of the rule against perpetuities. If it can possibly happen beyond those limits an interest conditioned on it is too remote. Gray on Perpetuities, sec. 214; 1 Jarman on Wills, 531; *Bigelow v. Cady*, 171 Ill. 229; *Sears v. Russell*, 8 Gray, 86.

In the construction of a will, all the words, including all provisos and conditions, must be considered for the purpose of ascertaining what estate the testator intended to confer; and if there are qualifying words which show that he did not intend the estate, or any interest therein, should vest unless the devisee should arrive at a specified age, the qualifying clause will control. *Friedman v. Steiner*, 107 Ill. 125; *Hamlin v. Express Co.* id. 443; *Davenport v. Kirkland*, 156 id. 169; *Healy v. Eastlake*, 152 id. 424; *Peoria v. Darst*, 101 id. 609; *Russell v. Buchanan*, 7 Sim. 628; 2 Jarman on Wills, (5th Am. ed.) 428.

Mr. JUSTICE CARTER delivered the opinion of the court:

Upon the bill of the appellee, the son and only heir-at-law of the testator, it was adjudged that the seventh paragraph of the will violates the rule against perpetuities and is therefore void, and that the fourth, fifth, sixth, eighth, ninth, tenth, twelfth and fifteenth paragraphs are dependent on the seventh for their effect and validity, and, with said seventh, constitute one entire scheme of the testator, and that said seventh paragraph being void the others mentioned are also void. The question was not raised below, nor has it been in this court, whether equity has jurisdiction to entertain a bill brought by the heir-at-law simply to construe a will and determine therefrom whether or not he, as such heir, is vested with the legal title to the property attempted to be

devised. We shall not, therefore, consider whether the bequests of personal property as made by the will, and the trust as created, would, or not, render inapplicable the rule that where only legal titles are involved and no other relief is asked, equity will not assume jurisdiction to declare such legal titles. (See *Strubher v. Belsey*, 79 Ill. 307; *Whitman v. Fisher*, 74 id. 147; *Harrison v. Owsley*, 172 id. 629; *Bowers v. Smith*, 10 Paige, 133; 1 Pomeroy's Eq. Jur. 352.) If it should appear to the casual reader that this rule has not always been applied by this court, a closer examination may show that the question was not mooted by the parties and that the case was not so foreign to equity jurisdiction as to obviate the necessity of raising the question in the proper manner. No such question having been raised in the case at bar, it will be assumed that it is one for cognizance in equity.

The first and principal question is whether or not said seventh paragraph of the will is void for remoteness. But before considering that question it is important to have in mind the substance of the preceding paragraphs, and the general objects and purposes intended to be accomplished by the testator as disclosed by his will.

It was in the first place stated in the will the testator was desirous of disposing of all his property, real and personal, and the first paragraph directs that payment of his funeral expenses and all his just debts be made.

The second paragraph gives and devises to the testator's wife, Annette H. Cheney, the home in Jerseyville during her life, and, in addition, \$25,000 absolutely, with the option of an annuity of \$2000 in lieu of said \$25,000, said devises and bequests to be in lieu of dower and of all her interest in the personal estate; and if she should elect to take under the will she was also given certain personal property, consisting of household and kitchen furniture, horses, carriages, cows, grain, etc.

The third paragraph gives and bequeaths to the son, the appellee, \$100, and all portraits, pictures, books, fur-

niture, clothing, etc., and heirlooms of his mother and grandparents at the testator's home; also the testator's guns, emblems, etc.

Paragraph 4 gives and devises all the residue and remainder of the testator's property, of every kind, to his trustee, the executor named in a subsequent paragraph, (being appellant,) to hold in trust for certain enumerated purposes, viz.: to lease and collect the rent of real estate and to manage and preserve it; to loan funds that may accumulate, after payment of debts and legacies, and out of the proceeds arising from real and personal property, after paying taxes and expenses of maintenance, the trustee is authorized, in his discretion, having in view the fulfillment of the testator's desires as made known by the will, to give to said son, if the trustee shall deem it advisable, \$100 each month, upon the condition that said son apply in person for the same; and it is provided that this allowance shall not be assignable or in any manner transferable, nor be paid upon any order to any other person or in any other manner except to said son on his personal application, it being testator's intention that said payments should be for partial support of his said son. In case the son shall marry, said allowance may be increased to \$200 per month, one-half of which, in the discretion of the trustee, to be paid to the wife, should she apply for it. In the event of sickness or accident such payments may be increased to an amount to meet the exigencies, without extravagance; and in the event of emergencies arising from intemperate conduct, evil associates or the violation of any law, no help whatever is to be furnished by said trustee and executor.

The fifth paragraph provides that should the testator's said son abstain from the use of intoxicating liquor or narcotic drugs, of whatever name or form, whether liquid or otherwise, and conduct himself as a worthy citizen, and be free of debts or judgments contracted within the year, (except for sickness,) for one year after the tes-

tator's death, the trustee is authorized, if deemed by him prudent and advisable, to pay said son \$1000; or if the conduct of said son has not been such as to convince the trustee that it will then be prudent and advisable to grant such payment, it shall be postponed until such time as and when such trustee shall be so convinced by his own knowledge and personal observation, and that such specified conduct and conditions have continuously existed for one full year. After two years of such continuous good conduct \$1500 may be paid as above provided, and after three years \$2000, and after four years \$2500, and after five years \$3000,—such installments not to be assignable, and the son to have no vested interest therein until payment shall have been made to him personally. The paragraph then provides that in the event the testator's son shall fulfill the conditions above set forth for five successive years, he is to have possession and full management of one-half of the testator's lands in Christian county, to be designated and set apart by the trustee, and thereafter to have all the rents and profits of such half after paying taxes and expenses, and the monthly payments above provided for shall be no longer payable. It is then provided that if said son shall continue the course of conduct and conditions above specified, and shall after two years and within five years thereafter save and accumulate from the use of said land, or by his own exertions in lawful business or by his savings from the aforesaid payments, \$7000 in money or in real estate in his own name, unencumbered, and be free from debts, the trustee shall then give to said son the possession and management of the remaining half of the testator's lands in Christian county. Said paragraph also gives the trustee power to sell and convey any and all of the testator's real estate except the lands in Christian county, and except also (unless the widow consents) the home place in Jerseyville during her life,—such power

to be exercised in his discretion, within certain limits prescribed by the will.

Paragraph 6 provides that if the testator's said son shall fail to fulfill the conditions prescribed in paragraph 5 of the will, by which the trustee is authorized to pay him \$1000 at the end of one year after the testator's death, then the trustee is directed to expend not less than \$500 nor more than \$1000 per annum, in any lawful manner, to assist in detecting and prosecuting the violation of the statutes of Illinois, or the ordinances of the city of Jerseyville, regulating the sale of intoxicating liquors or prohibiting gambling, wherever such laws have been violated within said city.

It seems clear from these provisions of the will, and from others, that it was the intention and purpose of the testator to accomplish, as far as it lay in his power by the testamentary disposition of his property, two things: the first and principal one being to reclaim his son from the use of intoxicating liquors, narcotic drugs and evil associations, and to induce him to form and maintain habits of sobriety, economy and industry; and the other was to preserve his large estate, and prevent its dissipation and loss by the waste and extravagance of his son, which the will shows he feared and sought to guard against, and, apparently with wise forethought, sought to make the latter purpose aid in the accomplishment of the former and principal one. As one of the means adopted to accomplish his objects he created a spendthrift trust.

It is the duty of the court, in construing a will, to ascertain as nearly as possible the intention of the testator as disclosed by the instrument, and to give it such a construction as will carry such intention into effect. It is, of course, true, that the will cannot carry into effect the intention of the testator in violation of law, and if any of the provisions of the will in controversy violate the rule against perpetuities, such provision or provisions

must be declared void, for it is the duty of courts to enforce the rule, and not to fritter it away by adverse construction. But when a will is susceptible of either of two constructions without doing violence to the intention of the testator as disclosed by the instrument, one of which would render the instrument void and the other valid, that construction should be adopted which would enforce the will as a valid instrument, and not that which would defeat its operation. (29 Am. & Eng. Ency. of Law, 352.) It is the rule that "no interest under a will subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years (and nine months, allowing for the period of gestation,) after some life in being at the creation of the interest." Gray on Perpetuities, sec. 210; *Howe v. Hodge*, 152 Ill. 252; *Lawrence v. Smith*, 163 id. 149.

It is insisted by appellee that this rule is violated by the seventh paragraph; and by appellant, that only so much of the latter part of the paragraph as limits the estate over to children of the grandchildren is in violation of the rule, and void, leaving the rest of the paragraph unaffected, valid and enforceable. Said seventh paragraph is as follows:

"*Seventh*—I hereby give, devise and bequeath the fee simple title of all my lands, lots and real estate, wherever situated, together with all my personal property of every name, grade or description, to my grandchildren, whatsoever number they may be, born to my said son, Alexander M. Cheney, share and share alike, to take possession only after the death of my said son. In the meantime, after the execution and performance of his duties hereunder by the trustee and executor, and my said son having fulfilled all the conditions and requirements set forth in the fifth paragraph hereof, he, my said son, shall have the full use and enjoyment, in possession, of all my lands, lots or real estate, wherever situated, for and during his natural life,—the power to sell and con-

vey real estate, except in Christian county, to continue and remain in said trustee as herein specified: *Provided always*, and the foregoing devise of the fee simple title of my real and personal estate is and shall be subject to the following conditions: No such grandchild shall acquire or be vested with an interest or any estate of inheritance in any part of my said real or personal estate unless such grandchild shall live to reach the age of thirty years. In the event that any such grandchild shall die before attaining the age of thirty years, he, she or they shall take nothing under the provisions of this will, neither shall any interest in any of my said real or personal estate be thereby vested in any person or persons through devise, inheritance or otherwise. In the event that any such grandchild shall die before attaining the age of thirty years, leaving a child or children, then in that case such child or children, living or posthumous, shall take the share which the parent would have taken had he or she survived and attained the age of thirty years."

It will be observed that no disposition of the title in fee to the realty, nor of the absolute title to the bulk of the personalty, had been made by any prior provision of the will, except in so far as it had been devised and bequeathed to the trustee for purposes of the trust. In the main, its final disposition had not been provided for. It was by this the seventh paragraph, and by subsequent paragraphs to be hereinafter noticed, that such final disposition was attempted to be made. The meaning of the principal clause of the seventh paragraph without the proviso would be clear and unmistakable. It would vest the title to the realty in fee simple absolute in the grandchildren,—that is, the children of appellee,—when and as they should be born, share and share alike, subject only to the life interests of appellee and other beneficial interests created by the will. Such title would vest in the child first born to appellee, subject to be opened

to let in any after-born child or children to an equal ownership and enjoyment of the estate. It is contingent only upon the birth of a grandchild. The fee simple title is devised, and although the word "heirs" or the words "heirs and assigns" are not used, the language employed, were it not qualified by the proviso, would be sufficient, even at common law, to pass title in fee simple absolute. (*Muhlke v. Tiedemann*, 177 Ill. 606.) The right of possession and beneficial use, only, were deferred until after the death of appellee, the son.

What, then, is the effect of the proviso? Counsel upon both sides have furnished us with able and exhaustive briefs and arguments upon this the principal question in the case, but we have not the time nor will it be necessary to fully review here their respective arguments or the authorities cited. They agree,—and, indeed, it can not be controverted,—that the last clause of the proviso limiting the estate over to great-grandchildren of the testator upon the contingency therein mentioned, namely, the death of the grandchild, their parent, before the age of thirty, is void for remoteness, it being clear that the contingent event might not happen and the estate vest in such great-grandchild within twenty-one years after the expiration of a life in being. It is, however, equally clear, we think, that the validity of the rest of the seventh paragraph is not affected by the invalidity of said last clause of the proviso. It does not follow that because the limitation over to great-grandchildren is void the devise and bequest to the grandchildren are void also. The last clause creating the limitation over may be rejected without doing violence to the remainder of the paragraph. *Eldred v. Meek*, 183 Ill. 26.

But the question remains, what is the effect of the other two clauses of the proviso on this paragraph of the will? It is a rule of construction that the law favors the vesting of estates rather than that they should be held contingent, and we would not be authorized, because

of the use of particular words in the proviso indicating a particular intent but of doubtful meaning, to construe this entire paragraph so as not only to thwart the general intention of the testator so clearly manifested by the entire will, but to ignore this rule of construction as well. The vesting of the estate in the possible grandchildren is, of course, contingent upon the birth of such grandchildren; but we do not think it was intended by the testator to make the vesting in them of all interest whatever contingent upon their reaching the age of thirty years, but only to make the vesting of the title in fee simple absolute in them contingent upon their attaining that age. In other words, we are of the opinion that the proviso and its several clauses were intended to, and do, have the effect of reducing what would otherwise be an absolute estate in the grandchild upon its birth, to a base or determinable fee,—a fee that would terminate upon the death of the grandchild before the age of thirty. It was the transmissible or inheritable interest that the testator sought to guard and provide for by the proviso and its different clauses, and not such an interest as would give the grandchildren the possession, use and enjoyment of the property upon the death of their father, the appellee. The qualifying clause, “no such grandchild shall acquire or be vested with an interest or estate of inheritance * * * unless such grandchild shall live to reach the age of thirty years,” is a limitation of the already devised fee by providing that he shall not be vested with an inheritable interest or estate before the age of thirty years. The remaining clauses of the proviso also deal only with the inheritable interest, as does the first, and not with any lesser one. This seems clear to us from the language employed by the testator which was not of a precise or technical character, and when he says in the second clause of the proviso that in the event of the death of any grandchild before he shall attain the age of thirty years he shall take nothing under the pro-

visions of this will, neither shall any interest be thereby vested in any person or persons through devise, inheritance or otherwise, he refers to the same kind of interest which it is the purpose of the proviso to qualify,—that is, an inheritable interest; one that such grandchild might otherwise dispose of by will or by gift *causa mortis* or which would pass by the laws of descent, for if by the phrase “they shall take nothing” he meant they should take nothing *until* they reached the age of thirty years, and if they died before should take no interest whatever, it would have been wholly unnecessary to say, “neither shall any interest * * * be thereby [that is, by their death,] vested in any person,” etc. If they never had any interest none could be devised or otherwise disposed of by them or be inherited from them. This latter clause would seem to imply that they would have some interest before reaching the age of thirty, which, so far as their interest in or power over it was concerned, the testator desired to utterly destroy at their death. This view is strengthened by the general scope and purposes of the will as they are disclosed by its provisions. For example, all of the paragraphs which provide for the ultimate disposition of the property are so guarded that if they were carried out as written the testator’s son could never *inherit* from any beneficiary under the will any part of the estate, and it is as clear that the testator intended to cut off any such possible inheritance as it is that he intended to cut off the inheritance from himself. If the son should marry and have a child, who, under the principal clause of the seventh paragraph, would take the title absolutely to the property, subject to his life interest, and such grandchild should die, he, the son, would take such property, or part of it, as heir of his own child, and the purpose of the testator to save the son from his own weaknesses and at the same time protect and save the property would be thwarted as completely as if he had made no will at all. It would seem from the general de-

sign of the testator not only reasonable, but essential to the accomplishment of such design, that he should limit the estate to the grandchildren, so that appellee could not inherit from them. To do this it was not necessary that they should have no interest at all until thirty years of age, but no interest which he could inherit from them. It is not said in any part of the proviso or of the will that they should have no interest whatever *until* thirty years of age. It is not improbable that the limit was fixed at thirty years because the testator may have considered that at that age his grandchildren would have children of their own, or that at least the danger would be small that his son would, after the lapse of so long a time, inherit the property, or if he should, that he would then waste it by irresponsible conduct.

Again, if it was the testator's intention that his grandchildren should take no vested interest, of any character, in the property at their birth or *until* they should reach the age of thirty years, it would have been easy to say so, or, at any rate, we would expect to find in the will, containing so many specific provisions, some provision or direction as to the beneficial use of this large property during the period which might reasonably be expected to elapse between the death of his son and the time when the grandchild would attain the age of thirty years. The will is wholly silent on that question, except that the first part of this paragraph gives them the right of possession after the death of the son. Such a period might not be greatly less than thirty years. The failure to make any other provision regarding it might, it is true, be attributable to oversight, or to the belief that it was provided for by the trust provisions of the will, and that the testator intended that the trustee should hold, manage, lease and care for the property during this possibly long period; but it would seem more reasonable that no provision was made for it because the property was given, during such period, to the grandchildren, and

therefore there was no necessity for any further provision respecting it. We do not find in the will any ground to infer that it was contemplated by the testator that after the real estate had all been turned over to the son for his use and enjoyment for life,—he having filled the prescribed conditions,—the trustee should re-possess himself of such real estate, but, on the contrary, the implication, if not the express direction, of the seventh paragraph is, that such grandchildren, if any, shall take possession upon the death of the son without regard to their age. Furthermore, it is to be noticed that by the twelfth paragraph of the will the testator authorizes the probate court to designate an attorney every three years, whose duty it shall be to familiarize himself with the provisions and intent of the will and to observe and examine the manner of its execution, and to report to the court any delinquency in the execution of the trust, and take proceedings in court to secure the sufficiency of the trustee's and executor's bond and the faithful execution of the will. But it is provided that such appointment, and the duties to be performed by such attorney, shall cease one year after the death of the testator's son. It is not necessary in this case to determine when the trust is to end, but it would hardly seem probable that the testator contemplated that it might continue actively for many years,—possibly thirty,—after the death of his son and during the minority of his grandchildren, as to the bulk of the estate, in view of his discontinuance, within one year after the son's death, of the services of the attorney appointed to guard the trust. It would seem much more reasonable that so prudent a testator would provide safeguards for so remote a period of the trust and during the infancy of his grandchildren, than that he would remove those which he had provided.

To determine whether the grandchildren, if any, and of whatever age, are by the seventh paragraph to have possession upon the death of the son, the language used

by the testator is carefully to be considered. After providing that they are to take possession only after the death of the son, the paragraph proceeds: "In the meantime * * * he, my said son, shall have the full use and enjoyment, in possession, of all my lands * * * during his natural life,"—that is to say, during the time intervening between the time when the trustee shall have delivered possession on his compliance with the conditions prescribed by the will and the time of the death of the son and the taking possession by the grandchildren, the son is to have the full use and enjoyment in possession, of the property. The testator was then, in this part of the paragraph, dealing with the beneficial use of the property in possession and fixing bounds to the time of its enjoyment. Having given the title to the grandchildren and limited their possession to begin only after the son's death, he then declared that in the meantime his son shall have it. Is it not perfectly clear that the testator understood that he had fixed a time when the grandchildren should come into possession? If not, why did he say that in the meantime the son should have it, and why did he make no provision on that subject in any of the clauses of the proviso? It should be borne in mind that the proviso was intended to qualify or limit the principal clause of the paragraph and not to override or supersede it, and the whole paragraph should be construed so as to give effect to all its parts according to the intention of the testator, if that can be done in accordance with the rules of law. We think such a construction as we have given the seventh paragraph will carry into effect the intention of the testator except as to the last clause of the proviso, and as to that the intention is plain, but being in conflict with the rule against remoteness, that part, only, is void.

The construction we have given this paragraph accords with the construction given to a will somewhat similar, in *Friedman v. Steiner*, 107 Ill. 125, where it was

held that an estate otherwise devised in fee simple was by the proviso reduced to a fee determinable. It was there said, that "one of the peculiarities of a fee determinable is, that it may become a fee simple absolute upon the happening of any event which renders impossible the event or combination of events upon which such estate is to end." So in the case at bar, when a grandchild shall reach the age of thirty years it will be no longer possible for him to die under thirty, and the fee determinable of which he was before seized becomes a fee simple absolute. See, also, *Lombard v. Witbeck*, 173 Ill. 396.

The eighth, ninth, and the first clause of the tenth, paragraphs of the will, all of which paragraphs were also declared void by the decree below as being dependent on said seventh paragraph, are as follows:

"*Eighth*—In the event that my said son shall die without leaving lawful issue or descendants of such lawful issue him surviving, I give and devise to Mary M. Tesse all of section 2, in town 11, north, in range 4, west, in Christian county, Illinois, or in the event of her death prior to the death of my said son, said land shall go to her child or children or to the descendants of such child or children, if any such there then shall be; but her interest or estate in said land hereby created contingent shall not pass to her heirs-at-law.

"*Ninth*—I give and devise to Catherine M. Tesse all of section 3, in town 11, north, in range 4, west, in Christian county, Illinois, under the same conditions, in like manner and subject in all things to the same limitations set forth in paragraph eight above. The said Mary M. Tesse and Catherine M. Tesse are sisters. They are the children of Anna C. Tesse, deceased, who was the daughter of Edward A. D'Arcy, deceased.

"*Tenth*—In the case of the death of my said son without leaving lawful issue or the descendants of such issue, such event will exterminate my descendants; and in the event of the death of my said son without leaving lawful

issue or the descendants of such issue, I direct and expressly provide that all the remainder of my property, both real and personal, including the balance of my land in Christian county, shall be appropriated, dedicated and set apart for the purpose of assisting young men in Jersey and Christian counties, in Illinois, in acquiring higher education."

The tenth paragraph also directed that a board of trustees be appointed by the circuit court of Jersey county to administer said charitable trust created by said paragraph. The thirteenth and fourteenth paragraphs appointed the appellant executor and trustee to execute and carry out the provisions of the will, and provided for the appointment of his successor, and contained directions as to the bond to be given. The fifteenth, declared void by the decree, provided for compensation to the executor and trustee. In view of the construction we have given the seventh paragraph we think it unnecessary at this time to consider the further question discussed by counsel,—that is, whether said paragraphs were or not dependent upon said seventh paragraph, and without which the testator did not intend they should operate as a part of his will; nor to consider whether said charitable trust would come into existence or effect in case of the extinction of his descendants, by death, before thirty, and, after appellee's death, of all grandchildren,—that is, all children which may be born to the appellee. It will be time enough to consider that contingency (which may never happen) when it arises. It is sufficient to say, that from the construction we give them and the whole will we find no part of the will void for remoteness except the last clause of the proviso to the seventh paragraph before mentioned. As we understand the decree and the arguments of counsel, all the paragraphs except the seventh, declared by the decree to be void for remoteness, were so decreed to be void because they were dependent on said seventh paragraph, which,

as it was held, was in conflict with the rule against perpetuities, and that it was not held or contended that they were of themselves invalid.

The decree will be reversed and the cause remanded to the circuit court, with directions to enter a decree in accordance with the views we have expressed.

Reversed and remanded, with directions.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

LAURA B. JOHNSON, Admx.

Opinion filed October 24, 1901.

PRACTICE—*alleged errors not urged in motion for new trial are waived.* Under section 56 of the Practice act, where a party files a written motion for a new trial specifying the grounds of such motion, he will be restricted, in a court of review, to the grounds so specified, and all other grounds are waived.

Illinois Central Railroad Co. v. Johnson, 95 Ill. App. 54, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Marion county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

WILLIAM H. GREEN, (J. M. DICKINSON, of counsel,) for appellant.

W. F. BUNDY, and **FRANK F. NOLEMAN**, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the 22d day of November, 1899, one Zeddie C. Johnson, while engaged in the discharge of his duty as an employee of the appellant company in the capacity of a switchman, in the yards of the company in Centralia, fell or was thrown under the wheels of a moving freight car and sustained injuries which resulted in his immediate

191	594
194	71
101a	628

191	594
201	500

191	594
105a	172
191	594
106a	330
106a	391
108a	586

191	594
209	51
209	555
210	222
211	457

191	594
115a	831

death. The appellee, as administratrix of his estate, instituted in the circuit court of Marion county an action on the case to recover damages under the provisions of the statute for the benefit of his widow and next of kin, on the theory his death was occasioned by actionable negligence on the part of the appellant company. Upon a trial before a jury judgment was rendered against the company in the sum of \$4000, and on appeal to the Appellate Court for the Fourth District the judgment was affirmed. This is a further appeal prosecuted by the appellant company to reverse the judgment.

Appellant contends that on the hearing in the circuit court no evidence whatever was produced showing the exercise of any degree of care whatever by the deceased, and that the attempt to show he was inexperienced, and therefore, in some degree, at least, exempt from the necessity of exercising care and caution, failed for a total lack of evidence to support it, and that evidence of negligence on the part of the appellant or any of its servants was wholly wanting. It is therefore urged we should reverse the judgment for the reason the circuit court refused to grant a peremptory instruction, presented in behalf of the appellant company at the close of all the evidence, to direct the jury to find the appellant company not guilty. Counsel for appellee insist the record does not bring before us the question whether the court erred in its ruling with reference to the said peremptory instruction, for the reason that the appellant company filed its motion for new trial in writing, in which it particularly specified the points or grounds relied on to entitle it to a re-trial, and did not in such motion specify the refusal of the court to grant the peremptory instruction as one of the points or grounds for such new trial.

It appears from the record counsel for appellant objected to the action of the court in refusing to grant the peremptory instruction, and excepted to such action of the court at the time the same was had and taken, and

such objection and exception were duly noted and certified in the bill of exceptions. It also appears from the bill of exceptions counsel for the appellant company presented to the trial court a motion in writing for a new trial, and in said motion specified four separate points or grounds of the motion, and that the refusal of the court to grant the peremptory instruction was not specified as one of such points or grounds or included in any of such specifications. We have frequently held that under the proper construction of section 56 of the Practice act, where a party files a motion in writing for a new trial, specifying therein the grounds or reasons for such motion, he will be restricted, in a court of review, to the grounds or reasons specified in such written motion, and will be deemed to have waived all other grounds or reasons for a new trial. *West Chicago Street Railroad Co. v. Krueger*, 168 Ill. 586; *Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath*, 91 id. 104; *Hintz v. Graupner*, 138 id. 158; *Consolidated Coal Co. v. Schaefer*, 135 id. 210; *Brewer & Hoffman Brewing Co. v. Boddie*, 162 id. 346.

The cases cited, and the ruling made therein upon the point in question, are familiar to counsel for the appellant company, but counsel ask us to reconsider the ruling in those cases, and adopt what they contend to be the better construction of said section 56 of the Practice act and withal the more reasonable rule, that if, in the course of a trial, exceptions are alleged and allowed and incorporated in the bill of exceptions in pursuance of section 59 of the Practice act, it should not be deemed necessary, in order to obtain a review of such exceptions by the Appellate or Supreme Court, the party should again, by way of a motion for a new trial, call the attention of the trial court to the exceptions, and obtain, through the medium of such motion for new trial, the action of the trial court for the second time on the alleged errors. We think the construction given the said section 56 of the Practice act correctly interprets the legislative intent.

The reasons for this conclusion are fully elaborated in the decided cases referred to and need not be here repeated.

The purposes to be subserved by objections urged to the court during the course of a trial and the renewal of such objections by way of a motion for a new trial are entirely different. While the trial is in progress the purpose is to avoid error upon the part of the court and to secure a fair, impartial and legal determination of the controversy. The purpose to be attained by a motion for a new trial, so far as it relates to errors which are thought to have occurred prior to the rendition of the verdict, is to call upon the trial court to review and reconsider its actions and rulings during the trial, to the end that any error which may have intervened may be corrected by the allowance of a new trial by the trial judge and the necessity avoided of accomplishing that purpose by resort to a court of review by appeal or writ of error. The purpose of a motion for new trial being, therefore, to obviate the necessity of resorting to an appellate tribunal, the soundness of the rule that a party should set forth in the motion for new trial all grounds therefor which he expects to urge in the court of review becomes manifest. If he has good reason for a new trial, every proper consideration demands he should make it known to the first tribunal which has power to grant him a rehearing of his cause.

Counsel do not seek to present any alleged grounds of error other than such as were comprehended within the motion for a peremptory instruction to return a verdict for the appellant company, and there being no error in that respect apparent in the record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

HUGH A. BINNS

v.

DAVID H. LAFORGE *et al.**Opinion filed October 24, 1901.*

1. TRUSTS—*trustees cannot delegate active trust.* Executors who, under the will, hold in trust the real and personal property given to a beneficiary, being required to retain the possession, control and management of the estate, have no power, after accepting the trust and taking possession of the property, to delegate the trust and convey the subject matter thereof to the *cestui que trust*, and any attempt to do so is null and void.

2. SAME—*statute does not prevent assignment of trust fund created by third party.* Section 49 of the Chancery act does not prohibit voluntary alienation by the *cestui que trust*, and in the absence of any restriction in the will creating the trust the *cestui que trust* may, in equity, assign the income, or part of it, as security for a debt owed by her.

3. CREDITOR'S BILL—*when trust fund held for benefit of debtor cannot be reached.* Under section 49 of the Chancery act, a trust fund, created in good faith by the will of a third person and held by trustees under the will, which will provides for payment of the income of the fund to the beneficiary debtor during life, cannot be reached by creditor's bill.

4. PRACTICE—*when guardian ad litem is properly appointed.* Minor defendants to a suit involving a trust fund, in which they are interested as owners of the body of the estate, are entitled to the protection of a *guardian ad litem* and to have him paid out of the funds in the hands of the trustees.

5. SAME—*when priority in filing cross-bill does not secure a preference.* Where a trust fund and all parties interested, including judgment creditors, are brought into court by the original bill filed by the trustees, no one judgment creditor can obtain any preference over the others by being the first to file a cross-bill.

APPEAL from the Circuit Court of Logan county; the Hon. JOHN H. MOFFETT, Judge, presiding.

Garrett M. LaForge died in 1891 leaving a last will and testament, which, in part, is as follows:

"First—It is my will that all my debts shall be fully paid by my executors, and all notes and accounts or

choses in action, of any and all kinds, shall be collected by them as soon after my decease as practicable. They shall also divide my real estate among my heirs, such as can be satisfactorily divided, and sell the balance, and to make, execute and deliver to the purchaser or purchasers thereof good and sufficient deeds of conveyance.

"Fourth—I give and bequeath to Kate A. Sharp, David H. LaForge and Gertrude M. Talbott nine thousand six hundred dollars (\$9600), to be divided equally among them, in addition to the following bequest: I give, devise and bequeath to the heirs of M. R. LaForge, deceased, one-eighth ($\frac{1}{8}$) of my net estate, less the indebtedness of M. R. LaForge to me, to be divided as follows: One-half to Catherine A. LaForge, his widow, and the balance to be equally divided among his children.

"Fifth—To my daughter Emily and her children, Harry C. Thompson, Jennie Cutler and Garrett W. Thompson, and to Kate A. Sharp and David H. LaForge and Gertrude Talbott, the remaining seven-eighths ($\frac{7}{8}$) of my estate, to be divided equally, share and share alike, and any indebtedness any of them owe me or my estate shall apply in part payment of their respective shares.

"Seventh—My executors are hereby directed and authorized to loan upon or invest in real estate all the share or interest of said Gertrude Talbott under this my will, and pay to her yearly the income of said investment during her life, and at her death to be paid to her child or children, if any survive her. If she dies having no child or children, then the same shall be paid in equal parts to her surviving brother and sister. * * *

"I hereby nominate and appoint David H. LaForge and Harry C. Thompson executors of this my last will and testament, in whom having implicit confidence, it is my wish and order that they shall not be required to give bond. And my executors shall have full power and authority to collect all debts due me, and to execute all necessary receipts, releases and acquittances of any mort-

gage or other debts due me; and for the purpose of selling my real estate, or any part thereof, they are hereby vested with and shall have full power and authority to make, execute and deliver deed or deeds of conveyance to the purchaser or purchasers, or to any person or persons entitled to the same under this my last will."

Said will was duly admitted to probate, and David H. LaForge and Harry C. Thompson, the executors therein named, duly qualified.

David H. LaForge, Kate A. Sharp and Gertrude M. Talbott are the children of M. R. LaForge, deceased, a son of Garrett M. LaForge, deceased, who died prior to the time of the death of his father.

In January, 1892, Gertrude M. Talbott and Benjamin S. Talbott executed and delivered the following request in writing to the executors of said estate:

"To David H. LaForge and Harry C. Thompson, executors of the last will and testament of Garrett M. LaForge, deceased, and trustees under said will:

"The undersigned, Gertrude M. Talbott and Benjamin S. Talbott, her husband, of the county of Logan and State of Illinois, (the said Gertrude M. Talbott mentioned in said last will and testament,) would respectfully request that the principal sum to be invested for the benefit of her, the said Gertrude M. Talbott, during the period of her natural life, and after her death to her child or children, as provided in and by said will, be invested in the purchase of the south-east quarter (S. E. $\frac{1}{4}$) of section nineteen (19), township twenty (20), north, range four (4), west of the third (3d) P. M., in the county of Logan and State of Illinois, at the purchase price and sum of twelve thousand dollars (\$12,000), which said sum is the fair cash market value of said land and the said land is fully worth the same; that the undersigned resided upon said land and know its producing powers and value, and know that in no other way could said money be so satisfactorily invested for the best interests of all persons now or at

any future time interested in said matter; that in making said investment at the request of the undersigned, they agree and bind themselves to hold the said trustees and executors free and harmless and clear from all trouble, fault-finding, loss, litigation and expenses of every nature, kind and character in the future that could in any manner arise by reason of making of said investment as herein requested, and expressly covenant and agree to pay all taxes and assessments that may be at any future time levied upon the said land or any part thereof, and keep the buildings thereon insured at about the value thereof in a good, solvent insurance company, and to keep the buildings and fences in good repair, and to so conduct their financial business as to prevent the said lands from being encumbered in any way by mortgages, judgments or liens of any description, on account of the debts now or at any future time to be contracted by them, the undersigned, or either of them. And it is further expressly agreed and covenanted and stipulated that in the event of the undersigned, Gertrude Talbott, failing or neglecting to pay said taxes and assessments levied or to be levied upon the said land, or any part thereof, during her natural life, or allowing or creating any liens upon the same, or any part thereof, then in that event the life estate of the said Gertrude M. Talbott in and to said land shall immediately cease and become terminated, and the said land, and the title thereto, shall revert and rest in said trustees, to-wit, the said David H. LaForge and Harry C. Thompson, and they shall be entitled to the immediate possession of the same, and shall have the right to rent said lands and collect the rents thereof, and apply the same to the payment of all valid liens or encumbrances upon and against said lands, and to the necessary repairs of the fences and buildings thereon, and the insurance of said buildings, and to retain out of all of said moneys coming to their hands the same commissions that are allowed administrators out of personal

property under the statute law of the State of Illinois, rendering the balance, if any, to the said Gertrude M. Talbott. In consideration of the making of said investment, as aforesaid, the said Gertrude M. Talbott hereby agrees to pay to said executors the sum of six per cent per annum on the said sum of twelve thousand dollars (\$12,000) until the said amount of interest, at the rate of six per cent, aforesaid, shall, with the sum in the hands of the said executors and trustees so aforesaid to be invested for the use of the undersigned, Gertrude M. Talbott, under the provisions of the said last will and testament, amount to the said sum of twelve thousand dollars (\$12,000)."

Thereupon the following deed was executed by said executors and delivered to Gertrude M. Talbott:

"David H. LaForge and Harry C. Thompson, executors of the last will and testament of Garrett M. LaForge, deceased, by virtue of the power vested in them by said last will and testament, and for the consideration of \$12,000 and the covenants, conditions and agreements hereinafter made a part thereof, this conveyance being made subject thereto, convey and quit-claim to Gertrude M. Talbott, of the county of Logan and State of Illinois, all interest, subject to the conditions and limitations hereinafter set forth, in the following described real estate: The south-east quarter (S. E. $\frac{1}{4}$) of section nineteen (19), township twenty (20), north, range four (4), west of the third (3d) P. M., Logan county, Illinois, for and during her natural life, and at her death to her child or children surviving her. But if the said grantee herein dies leaving no children her surviving, then in that event said real estate herein above mentioned and described, and the title thereto and all the interest therein, to revert to and vest in the said parties for the uses and purposes and trusts in said will and testament expressed. This deed is made expressly subject to all the conditions, provisions, agreements, covenants and stipulations con-

tained in the request and paper hereto attached, signed by said Gertrude M. Talbott and her husband, and which is expressly made a part hereof, and this conveyance is made and the title to said land vested in said second party by said first party, and the same received by her upon all said conditions, limitations, covenants, agreements and stipulations, and expressly subject thereto, and not otherwise. Said above described real estate being situated in the county of Logan and State of Illinois."

Shortly afterwards, upon a similar request in writing signed by Gertrude M. Talbott and her husband, David H. LaForge and Harry C. Thompson, as executors, conveyed another one hundred and sixty acres of land which they had purchased, and six lots in the village of New Holland, to said Gertrude M. Talbott, in consideration of \$9600. The deeds conveying said premises contained similar provisions to those contained in the deed hereinbefore set out in full. Gertrude M. Talbott built a dwelling house costing about \$2000 on said lots, the total cost of the house and lots being \$3000.

After the execution of these deeds Gertrude M. Talbott took possession of said lands and leased the same. On October 21, 1898, she leased the south-east quarter of section 19, township 20, north, range 4, west of the third principal meridian, to Samuel G. Baughan, from March 1, 1899, to March 1, 1900, and on November 30, 1898, she assigned said lease to James Ryan to secure the sum of \$631.05 due him by her, which was evidenced by a promissory note bearing date November 30, 1898.

On June 10, 1899, appellant, Hugh A. Binns, recovered a judgment in the circuit court of Logan county, Illinois, for \$1000 against Gertrude M. Talbott and Benjamin S. Talbott, her husband, upon which execution was issued and returned "no property found." After June 14, 1899, judgments were confessed against Gertrude M. Talbott and Benjamin S. Talbott, in amounts aggregating the sum of \$12,000. On the 16th day of June, 1899, Gertrude

M. Talbott and her husband re-conveyed to David H. LaForge and Harry C. Thompson, executors of the last will and testament of Garrett M. LaForge, deceased, all the lands and lots theretofore conveyed to them by said executors. David H. LaForge and Harry C. Thompson, as executors, upon receipt of said conveyance immediately took possession of the lands and commenced renting the same and receiving the rents. Gertrude M. Talbott remained in possession of the residence in New Holland.

At the September term, 1899, of the circuit court of Logan county, a bill in chancery was filed by David H. LaForge and Harry C. Thompson, as executors of the last will and testament of Garrett M. LaForge, deceased, against Gertrude M. Talbott, Benjamin S. Talbott, James Ryan and the various judgment creditors of Gertrude M. Talbott and Benjamin S. Talbott, as parties defendant, setting up the proceedings as above stated, and praying that the rights of said complainants under the will of Garrett M. LaForge, deceased, and the said several conveyances, be determined, and that the liens of said judgments be removed as clouds upon their title. Afterward, by order of court, the bill was amended, making the children of Gertrude M. Talbott parties defendant. Answers were filed, and afterwards cross-bills were filed by appellant and two other judgment creditors, in the nature of creditors' bills. James Ryan also filed a cross-bill asking that the rents of the land covered by the lease assigned to him be applied in payment of his debt, to which cross-bill answers were filed, and upon a hearing the court entered a decree finding that the property set aside by the will of Garrett M. LaForge, deceased, for the benefit of Gertrude M. Talbott, was held in trust by the executors named in the said will; that said trust was an active and personal trust; that the trustees were clothed with discretionary power, which could only be exercised by them personally, under the provisions of said will; that in investing said estate in the real estate described in said

bill they were acting within the discretionary power in them vested by the terms of the will, and that they held the same as trustees, for the benefit of Gertrude M. Talbott and her children, under the limitations and restrictions imposed by the terms of the said will; that such trustees could not divest themselves of the personal responsibility attached to said trust by conveying said premises to Gertrude M. Talbott for life and thereby giving her the control and management thereof, and that the said request and deeds were null and void and of no force and effect; that said Gertrude M. Talbott, under the terms created by said will, took no interest in the income arising from said estate until the same was produced and placed in the hands of said trustees; that said trust was created by Garrett M. LaForge to furnish Gertrude M. Talbott and her family with a support and maintenance; that the income from said trust estate, unless there was an excess above what is required to properly and reasonably support her and her family, was not liable to the claim of her creditors, whether on execution, by garnishment, or, in equity, upon creditor's bill; that the income now in the hands of the trustees is income that has been accumulated during the pendency of this suit and which Gertrude M. Talbott has been deprived of during that period; that the complainant, Ryan, in the cross-bill filed by him, must, as to the income held now in the hands of the trustees, be held to be an equitable assignee of Gertrude M. Talbott by her own voluntary act, and as such has a prior claim to all other creditors complainant in the various cross-bills herein, and decreed that \$60 per month, as a reasonable sum for the support and maintenance of Gertrude M. Talbott and her family, be paid to her in person, in installments of \$30, on the 1st and 15th of each month, commencing with February 1, 1901; that said income to the extent of \$60 per month shall be held free from all claims upon the same, whether voluntary, by assignment, or involuntary, as by execution, garnish-

ment, creditor's bill or otherwise, and shall be paid to her in person, upon her individual receipt, and that out of the remainder of said income, after the payment of said \$60 a month, said trustees first pay the taxes, insurance and repairs upon said property; secondly, the cost of this suit, including \$50 as guardian *ad litem* fees; thirdly, the amount due James Ryan; and lastly, the residue, if any, *pro rata* to the various judgment creditors, complainants in said-cross bills,—from which decree the appellant has prosecuted an appeal to this court.

BLINN & HARRIS, for appellant.

ROBERT HUMPHREY, guardian *ad litem*.

BEACH & HODNETT, and KING & MILLER, for appellees David H. LaForge *et al.*

W. A. COVEY, (A. L. ANDERSON, of counsel,) for appellee James Ryan.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal by the complainant in a cross-bill in the nature of a creditor's bill, seeking to apply in payment of a judgment against Gertrude M. Talbott and Benjamin S. Talbott, her husband, the income upon certain trust funds in the hands of the executors of Garrett M. LaForge, deceased, set aside for the benefit of said Gertrude M. Talbott by Garrett M. LaForge, her grandfather, in his will.

First—David H. LaForge and Harry C. Thompson, as executors, by virtue of the terms of the will of Garrett M. LaForge, deceased, hold in trust all of the property given to Gertrude M. Talbott by said will, whether the same is real or personal. The execution of the trust thus created requires that said executors, as trustees, retain the possession, control and management of said estate,

and the only interest Gertrude M. Talbott has in said estate is the right to receive from said trustees the yearly income thereof during her life. The trust is an active one, and the trustees, after accepting the trust and taking possession of the property, had no power to delegate such trust, and the attempt to convey the subject matter thereof to Gertrude M. Talbott was void and of no effect. The case must therefore be considered the same as though said deeds had never been made.

In *Williams v. Evans*, 154 Ill. 98, Mrs. Williams conveyed her estate to trustees upon condition that they should pay her the income thereof during her life, and upon her death should use the body of the estate with which to purchase a site and erect thereon a church. After the execution of the trust deed and the receipt of the estate the trustees surrendered the estate into the custody of Mrs. Williams. On page 106 it is said: "Upon the execution and delivery of the trust instrument and the property therein described, by Mary Williams to the trustees, the rights of the parties became fixed, and the trustees, after accepting the trust, had no authority to deliver the possession of any of the property named in the trust instrument to Mrs. Williams, and the fact that they disregarded their duty in this regard did not affect the validity of the transaction as originally made. If there was a complete delivery of the trust instrument, and the property therein described, to the trustees, as we think there was, the subsequent acts and declarations of Mrs. Williams and the trustees cannot defeat the trust."

Second—Can the income upon the trust fund, which the will provides shall be paid by the trustees to Gertrude M. Talbott during her life, be reached while in the hands of the trustees by her creditors by creditor's bill? We think not, as by statute (1 Starr & Cur. Stat. chap. 22, sec. 49,) trust property, "when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant

himself," is expressly excepted from property which may be reached by a creditor's bill. The trust fund in this case proceeded from Garrett M. LaForge, a person other than Gertrude M. Talbott, and falls within the letter and the spirit of this statute, and is protected. In *ReQua v. Graham*, 187 Ill. 67, it is said, trusts thus created "rest in a large part upon the distinct ground that a creditor is not defrauded, and therefore has no cause of complaint, because the owner of property, in the free exercise of his will, so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support."

The chancellor, in construing this statute, adopted the New York rule, which is based upon an express statute, and held only so much of the income from this trust estate exempt as may be necessary for the maintenance of the beneficiary, Gertrude M. Talbott, and her children who were dependent upon her for support. Whether or not such rule should be engrafted upon our statute we need not now consider, as no cross-errors have been assigned, and such error, if any it is, was not prejudicial to appellant, and he cannot complain.

Third—The statute is not designed to protect the trust fund from the voluntary alienation of the *cestui que trust*, and there being no restriction in this will, there is no reason why Gertrude M. Talbott might not in equity assign said income, or a part thereof, to James Ryan, as security for a debt which she owed him. This is, in effect, all that was done by the assignment to him of said lease.

Fourth—The minor children of Gertrude M. Talbott were parties defendant to the original and cross-bills, and we think the court properly appointed a guardian *ad litem* to defend for them, and ordered him paid, as such guardian *ad litem*, out of the funds in the hands of the trustees. Said minors were interested in the subject matter of the suit, they being the owners of the body of the estate, subject to the right of their mother to re-

ceive the income therefrom during her life, and it was proper their interests therein should be protected by a guardian *ad litem*.

Fifth—The contention of the appellant that he is entitled to a preference over the other cross-complainants by reason of the fact that his cross-bill was filed first, is without force. The fund and all the parties interested, including the appellant and the other judgment creditors, were brought into court by the original bill. Under such circumstances no one judgment creditor, by cross-bill, could obtain any advantage over the other judgment creditors by reason of the fact that his cross-bill was the one, in point of time, which was first filed with the clerk.

Neither do we concur in the contention of appellant that the transactions between the trustees and Gertrude M. Talbott amounted to an equitable assignment of the future income of said trust estate for the benefit of her creditors. The language of the request, after stating that the title should revert to the trustees, is: "And they shall be entitled to the immediate possession of the same, and shall have the right to rent said lands and collect the rents thereof, and apply the same to the payment of all valid liens or encumbrances upon and against said lands, and to the necessary repair of the fences and buildings thereon, and the insurance of said buildings," etc. This provision was made for the protection and benefit of said trustees, and not for the benefit of the creditors of Gertrude M. Talbott, and such creditors can take no benefit by reason thereof.

We find no reversible error in this record. The decree of the circuit court will therefore be affirmed.

Decree affirmed.

JAMES WILLIAMS
v.
THE WEST CHICAGO STREET RAILROAD COMPANY.

Opinion filed October 24, 1901.

1. **REWARD**—*terms of reward must be substantially complied with by claimant.* One offering a reward may prescribe whatever terms he sees fit, and such terms must be substantially complied with before any contract arises between him and the claimant.

2. **SAME**—*what not a compliance with terms of reward.* The terms of a reward "for the arrest and conviction of the murderer or murderers" of a party are not complied with by one who merely furnishes some information to the police which led to the arrest of one of the murderers, and identified both murderers as having been in the vicinity of the scene of the crime, but did nothing more toward securing their conviction, which was had upon other information obtained by the police authorities.

3. **SAME**—*services must be performed in view of the reward.* A reward cannot be recovered unless the claimant knew, at the time of the performance of his services, that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the services specified in the offer.

Williams v. West Chicago Street R. R. Co. 94 Ill. App. 385, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

PEASE & POLKEY, (OSCAR B. MCGLOSSON, and HENRY C. BEITLER, of counsel,) for appellant:

The practice of withdrawing cases from the consideration of juries is looked upon with disfavor by the law, and should never be resorted to where there is any substantial evidence in support of the material allegations of plaintiff's declaration. *Pullman Car Co. v. Laack*, 143 Ill. 241; *Frazer v. Howe*, 106 id. 563; *Siddall v. Jansen*, 168 id. 43; *Railway Co. v. Dunleavy*, 129 id. 132; *Rack v. Railway Co.* 173 id. 289; *Offutt v. Exposition Co.* 175 id. 472.

The tendency of our courts is in the direction of liberal construction of offers of reward. Literal construc-

tion of these offers has been repeatedly condemned, and in all cases where there has been a substantial, though not literal, compliance with the terms of the reward by the claimant he has been held to be entitled to recover. *Bank v. Hart*, 55 Ill. 67; *Besse v. Dyer*, 91 Mass. 151; *Crawshaw v. Roxbury*, 7 Gray, 374; *Swanton v. Ost*, 74 Ill. App. 281; *Haskell v. Davidson*, 40 Atl. Rep. 330; *Montgomery v. Robinson*, 85 Ill. 174.

Where a reward is offered for the arrest of a malefactor it is not necessary that the claimant of such reward should have actually arrested the criminal with his own hands. If the information which he supplies to the proper authorities is the active and efficient means of the arrest or detention this has been held to be sufficient. *Swanton v. Ost*, 74 Ill. App. 281; *Ensminger v. Horn*, 70 id. 605; *Montgomery v. Robinson*, 85 Ill. 174; *Crawshaw v. Roxbury*, 7 Gray, 374; *Besse v. Dyer*, 91 Mass. 151; *Salvadore v. Insurance Co.* 22 La. Ann. 328; *Bank v. Bangs*, 2 Edw. Ch. 95; *Haskell v. Davidson*, 40 Atl. Rep. 330.

In cases where rewards have been offered for services in the arrest or conviction of offenders, or both, and the evidence shows the rendition of substantial services in either regard by the claimant after the reward was offered, he has uniformly been permitted to recover, even though he has not performed all the services required by the offer. *Swanton v. Ost*, 74 Ill. App. 281; *Bank v. Hart*, 55 Ill. 67; *Ensminger v. Horn*, 70 Ill. App. 606; *Montgomery v. Robinson*, 85 Ill. 174; *Russell v. Stewart*, 44 Vt. 170; *Besse v. Dyer*, 91 Mass. 151; *Haskell v. Davidson*, 40 Atl. Rep. 330; *Crawshaw v. Roxbury*, 7 Gray, 374.

It is not even necessary that the claimant know of the offer of reward having been made at the time of the commencement of rendition of his services in order to recover. *Coffey v. Commonwealth*, 37 S. W. Rep. 575; *Williams v. Carwardine*, 4 B. & A. 621; *Dawkins v. Sappington*, 26 Ind. 199; *Russell v. Stewart*, 44 Vt. 170; 21 Am. & Eng. Ency. of Law, 398, note 2; *Auditor v. Ballard*, 9 Bush. 572; *Eagle v. Smith*,

4 Houst. 293; Clark on Contracts, 58; *Hayden v. Songer*, 26 Am. Rep. 6; *Everman v. Hyman*, 28 N. E. Rep. 1022.

The fact that the claimant's connection with the case may have begun before the reward was offered has never been considered fatal to his claim in cases of this nature, if, after the offer was made, he rendered substantial services in compliance with its terms and with the intention of claiming the reward offered. *Coffey v. Commonwealth*, 37 S. W. Rep. 575; *Auditor v. Ballard*, 9 Bush. 572; *Ensminger v. Horn*, 70 Ill. App. 605.

JOHN A. ROSE, and LOUIS BOISOT, (W. W. GURLEY, of counsel,) for appellee:

Where a reward is offered for two results, both must be shown, or there can be no recovery. *Hogan v. Stophlet*, 179 Ill. 150; *Furman v. Parke*, 21 N. J. L. 310; *Jones v. Bank*, 8 N. Y. 228; *Fitch v. Snedaker*, 38 id. 248; *Stephens v. Brooks*, 65 Ky. 137; *Clanton v. Young*, 11 Rich. L. 546; *Blain v. Express Co.* 69 Tex. 74.

Merely giving information that leads to an arrest does not entitle one to a reward offered for the arrest. *Shuey v. United States*, 92 U. S. 73; *Juniata County v. McDonald*, 122 Pa. St. 115; *Austin v. Milwaukee County*, 24 Wis. 278; *Sias v. Hallock*, 14 Nev. 332; *Burke v. Wells, Fargo & Co.* 50 Cal. 218; *Commonwealth v. Anderson*, 5 Kulp. 302; *Everman v. Hyman*, 28 N. E. Rep. 1022.

In order to obtain a reward for the conviction of an offender it is necessary to assume burden of prosecution. *Fallick v. Barber*, 1 M. & S. 108; *Burke v. Wells, Fargo & Co.* 50 Cal. 218; *Rinehart v. Lancaster*, 6 Atl. Rep. 91; *Lovejoy v. Railway Co.* 53 Mo. App. 386; *Bank v. Bangs*, 2 Edw. Ch. 95.

An employee of the party offering a reward is not, as a general rule, qualified to claim it. *Russell v. Stewart*, 44 Vt. 170; *Stacy v. Bank*, 4 Scam. 91; *VanHorn v. Water Co.* 115 Cal. 448; *Pool v. Boston*, 5 Cush. 219.

Services rendered in ignorance of the offer of a reward do not entitle the party to such reward. *Railroad Co.*

v. *Sebring*, 16 Ill. App. 181; *Fitch v. Snedaker*, 38 N. Y. 248; *Ensminger v. Horn*, 70 Ill. App. 605; *Howlands v. Lounds*, 51 N. Y. 604; *Vitty v. Eley*, 64 N. Y. Supp. 397; *Stamper v. Temple*, 6 Humph. 113; *Hewitt v. Anderson*, 56 Cal. 476; *Lee v. Flemingsburg*, 7 Dana, 28.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action of assumpsit brought by the appellant, against the appellee, in the circuit court of Cook county, to recover a reward offered by the appellee for the arrest and conviction of the murderer or murderers of C. B. Birch, who was killed while in the service of the appellee, which, as published, was in the following terms:

"\$5000 Reward.

"OFFICE WEST CHICAGO STREET RAILROAD CO.,

"June 24, 1895.

"The above reward will be paid by the West Chicago Street Railroad Company for the arrest and conviction of the murderer or murderers of C. B. Birch, who was fatally shot while in discharge of his duty as receiver, on the morning of June 23, at the Armitage avenue barn.

CHARLES T. YERKES, *Pres't.*"

At the close of all the evidence the court directed the jury to find the issues for the defendant, which was accordingly done, and a judgment having been rendered on said verdict, which judgment has been affirmed by the Appellate Court for the First District, a further appeal has been prosecuted to this court.

At about two o'clock on Sunday morning, June 23, 1895, Birch, whose duty it was to receive the money brought in by the conductors, was fatally shot at the barn of appellee located at Armitage avenue, in the city of Chicago. The appellant, who was also an employee of the appellee, and whose duty consisted of going from barn to barn each night to inspect the cash registers, was in the barn from midnight until two o'clock in the morning, and left just before the killing of Birch. As he drove away in his buggy he noticed two men coming

across the street toward the barn. They looked sharply at him and he looked at them. On Monday morning, June 24, the appellant went to the appellee's office, where he met its general superintendent, who inquired of him if he saw any men near the barn as he drove away. Appellant told him that he had seen two men and that he thought he could identify them, whereupon the superintendent gave him a note and told him to go and see Capt. Larson of the police force. He called upon Capt. Larson that afternoon, told him what he had seen and gave him a description of the two men, whereupon the officer said that he had a man in custody at that time who he thought answered the description of one of the men described by him. The man, whose name was Julius Mannow, was brought up and was identified by the appellant as one of the men he had seen near the barn as he drove away. Capt. Larson told him to come to the station the next day, and in the meantime he would hunt up and have arrested the other man he had described. The murder of Birch led the police authorities to at once issue what was termed a "drag-net order,"—that is, an order to the various patrolmen to arrest all suspicious characters in their respective districts and bring them in for examination as to their whereabouts at the time of the commission of the crime. Mannow was thus arrested and brought to the station. A police officer named Jurs testified upon the trial of this cause that about two months before the time of the murder Mannow had narrated to him a plan for the robbing of a coal office in the manner in which the Armitage avenue robbery was accomplished, and had described Joseph Windrath as concerned in the plan, and that after the Armitage avenue robbery and the murder of Birch the witness at once recalled this fact and suspected Mannow and Windrath and took steps to cause their arrest. This was before the information was given by the appellant. On Tuesday morning, the 25th day of June, the appellant for the

first time learned of the offered reward by reading the same as published in the *Chicago Tribune*. Afterwards, on that day, he went again to the police station and identified Windrath, who had been arrested in the meantime, as the man he had seen in company with Mannow near the barn just before the killing. The services rendered by the appellant in connection with the arrest and conviction of Mannow and Windrath after he knew of the offered reward, consisted in his identification of Windrath, and his testifying before the coroner's jury, the grand jury, and upon the trial in the criminal court, that he had seen Mannow and Windrath together near the Armitage avenue barn on the night and near the time of the commission of the crime. Other information was obtained by the police authorities shortly after the identification of Mannow and Windrath which fastened the crime upon the two men. Mannow pleaded guilty and Windrath was tried and convicted. The offered reward was paid by the appellee to another claimant.)

The offer of a reward remains conditional until it is accepted by the performance of the service, and one who offers a reward has the right to prescribe whatever terms he may see fit, and such terms must be substantially complied with before any contract arises between him and the claimant. Thus, if the reward is offered for the arrest and conviction of a criminal, or for his arrest and the recovery of the money stolen, both the arrest and conviction or arrest and recovery of the money are conditions precedent to the recovery of the reward; and when the offer is for the delivery of a fugitive at a certain place the reward cannot be earned by the delivery of him at another place, and an offer for a capture of two is not acted upon by the capture of one. The reward cannot be apportioned. The offer is an entirety, and as such must be enforced, or not at all. 21 Am. & Eng. Ency. of Law,—1st ed.—391-397; *Hogan v. Stophlet*, 179 Ill. 150; *Furman v. Parke*, 21 N. J. L. 310; *Fitch v. Snedaker*, 38 N. Y.

248; *Juniata County v. McDonald*, 122 Pa. St. 115; *Shuey v. United States*, 92 U. S. 73.

In *Hogan v. Stophlet*, *supra*, which was an action for the recovery of a reward offered for the "apprehension and conviction of a criminal," this court said (p. 153): "The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was offered, not for the conviction alone, but for the apprehension *and* conviction of the guilty party. Appellant is entitled to recover for both or he cannot recover at all. The reward cannot be apportioned,—that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety, or not at all."

In *Furman v. Parke*, *supra*, the reward was "for the apprehension and conviction of such person or persons as may have been implicated in the murder of John B. Parke, John Castner, Maria Castner and child." The court say: "The reward is to be paid for the apprehension and conviction, not of one of several persons implicated, but of the person (if one) or the persons (if more than one) who were implicated, not in the murder of John B. Parke alone, but of John B. Parke and three other persons. * * * The person, therefore, to be entitled to the reward, must aver and prove that the person or persons implicated in each of the four murders has or have been apprehended and convicted."

In *Fitch v. Snedaker*, 38 N. Y. 248, the offer was "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder," etc. It appeared that the claimant gave evidence which led to the conviction of the offender but did nothing towards securing his discovery or arrest, and it was held that he was not entitled to the reward. The court said (p. 250): "It is entirely clear that in order to entitle any person to the reward

offered in this case he must give such information as shall lead to both apprehension and conviction,—that is, both must happen, and happen as a consequence of information given. No person could claim a reward whose information caused the apprehension, until conviction followed. Both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that had the information been concealed or suppressed there could have been no conviction. This is according to the plain terms of the offer of the reward."

In *Juniata County v. McDonald*, *supra*, the reward was for the capture and delivery of a criminal to the jail, and a person who furnished information from which the capture resulted, but who did not deliver the prisoner or cause him to be delivered, was held not to be entitled to the reward. The court said: "A mere reading of this paper settles the whole controversy. The reward was not offered for information as to the prisoner's whereabouts, but for his capture and delivery. How, then, could one be entitled to that reward who neither captured nor delivered him? Admitting, then, that the plaintiff gave the sheriff accurate information as to where the culprit could be found, and that he went with him and acted as one of his posse, yet on that officer fell the duty of arrest and the plaintiff was relieved of all responsibility."

And in *Shuey v. United States*, *supra*, which was a suit for a reward offered by the Secretary of War "for the apprehension of John H. Surratt, one of Booth's accomplices," it was held that one who had made disclosures to which were due the discovery and arrest of Surratt was not entitled to the reward for his apprehension. The court say: "It is found as a fact that the arrest was not made by the claimant, though the discovery and arrest

were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were."

Under the authorities above cited the appellant can not recover unless the evidence shows he caused the arrest and conviction of both Mannow and Windrath. He did neither. At most he furnished some information to the police which led to the arrest of Windrath, and identified both men as having been in the vicinity of the barn at the time of the commission of the crime, which does not bring him within the terms of the offered reward, which was for "the arrest and conviction of the murderer or murderers of C. B. Birch."

We are of the opinion that the appellant is not entitled to recover in this case for the further reason that the services performed by him were substantially all rendered before the reward was offered or at a time when he was ignorant of the fact that a reward had been offered. After the appellant had informed the superintendent of appellee and the captain of police that he had seen Mannow and his companion near the scene of the murder at about the time the same was committed, he did nothing towards securing the conviction of the prisoners other than what he could have been required to do as a witness. The reward was not offered for information which was already in the possession of the officers nor for witnesses who would come forward and testify to facts which were then known to be within their knowledge, but for the arrest and conviction of the murderer or murderers. The right to recover a reward arises out of

the contractual relation which exists between the person offering the reward and the claimant, which is implied by law by reason of the offer on the one hand and the performance of the service on the other, the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof by reason of the performance by him of such service, and no such promise can be implied unless he knew at the time of the performance of the service that the reward had been offered, and in consideration thereof, and with a view to earning the same, rendered the service specified in such offer. *Fitch v. Snedaker, supra*; *Howlands v. Lounds*, 51 N. Y. 604; *Stamper v. Temple*, 6 Humph. (Tenn.) 113; 44 Am. Dec. 296.

In *Stamper v. Temple, supra*, which was an action to recover the amount of a reward, the court say: "To make a good contract there must be an *aggregatio mentium*,—an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered?"

In *Fitch v. Snedaker, supra*, on the trial several questions were asked of the plaintiff, who was a witness in his own behalf, relative to the person to whom he gave information in relation to the murder before the reward was offered or before he heard of it. The court sustained objections thereto and excluded the evidence. The ruling of the trial court in this regard on appeal was held to be correct, and the court on page 251 say: "The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties? To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. * * * Without that there is no contract.

How, then, can there be consent or assent to that of which the party has never heard? * * * The offer could only operate upon plaintiffs after they heard of it."

And in *Howlands v. Lounds*, *supra*, the court say (p. 605): "In order to entitle a party to recover a reward offered, he must establish between himself and the person offering the reward, not only the offer and his acceptance of it, but his performance of the services for which the reward was offered; and upon principle, as well as upon authority, the performance of this service by one who did not know of the offer and could not have acted in reference to it cannot recover."

We are of the opinion the appellant failed to make out a cause of action, and that the trial court, for the reasons above suggested, properly directed a verdict for the appellee. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

WILLIAM DAVIS *et al.*

v.

DELPHINA LUSK.

Opinion filed October 24, 1901.

1. TRUSTS—*legal title vests in heirs of trustee at his death.* At the death of the trustee in a trust deed the legal title vests *eo instanti* in his heirs, and can only be divested by their voluntary conveyance or by an order of court in a proceeding to which they are parties.

2. SAME—*when deed from trustee appointed by court as a successor in trust is void.* If the heirs of a deceased trustee in a trust deed are not made parties to a proceeding in which a new trustee is appointed, the latter's deed purporting to convey the property is void; nor are the grantors in the trust deed estopped to assert such invalidity because they appeared in the proceeding for appointing the new trustee and consented to the decree.

APPEAL from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

JEFFERSON ORR, *pro se* and for other appellant.

WILLIAM MUMFORD, and W. L. COLEY, for appellee.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

In July, 1900, the circuit court of Pike county entered a decree upon the bill of appellee, against appellants, setting aside a certain deed as a cloud upon the complainant's title, and enjoining the further prosecution of a suit before a justice of the peace in forcible entry and detainer. To reverse that decree appellants prosecute this appeal.

The abstract of the record is very imperfect, and does not comply with the rule of this court as to an index thereto. As we gather, however, from it and the record, the complainant below, together with her husband, Henry A. Lusk, as early as February 14, 1867, executed and delivered to one D. D. Hicks, as trustee for James Davis, a deed of trust in the nature of a mortgage on lot 8, in block 14, in the town (now city) of Pittsfield, Illinois, to secure the payment of the promissory note of her husband for \$2200, of even date with the trust deed, due one year after date. Afterward said note was assigned to the appellant William Davis. In 1897 Hicks, the trustee, died, and William Davis filed a bill in the circuit court of Pike county to have another trustee appointed in his stead, but in that bill he failed to make the heirs of Hicks parties defendant. The complainant and her husband entered their appearance in that suit, and a decree was rendered purporting to appoint the appellant Jefferson Orr as trustee to succeed the said Hicks. In the summer of 1899, Orr, assuming to act as such trustee, advertised the property for sale, and on the 15th of November, 1899, sold the same to the present appellant William Davis, for \$7800. Prior to the sale, Henry A. Lusk, husband of the complainant, served on both of the appellants

a written notice that the debt for which the trust deed had been given was paid, and demanded a release of the same. The bill alleges that the deed from Orr to William Davis, in pursuance of the sale of November 15, 1899, is void, for the reason that Orr was not legally appointed trustee, and that the legal title to the premises never vested in him. It also sets up usury; that the debt had been fully paid, and that the trust deed was barred by the Statute of Limitations. The defendants answered the bill, admitting that in the proceeding to appoint a successor in trust for Hicks his heirs were not made parties defendant, and it is, in effect, conceded that the legal title to the premises was not vested by that decree in Jefferson Orr. Counsel for appellants, in his argument, say: "We do not contend that Orr's deed passed title, but we do contend that the bill upon which the decree was rendered appointing Orr, and the decree of his appointment and the admission and consent of Delphina Lusk, constitute a complete and absolute estoppel as against Delphina Lusk, and that she is not permitted to impeach said deed."

We are at a loss to perceive how it can be that Orr's deed to William Davis passed no title, and yet the complainant is estopped to impeach that deed. If counsel means that the proceeding under which Orr was appointed trustee, though irregular, was not absolutely void, and therefore not subject to attack in a collateral proceeding, the answer must be, that in so far as that decree attempted to affect the legal title it was not merely voidable, but absolutely void. Upon the death of Hicks the title *eo instanti* vested in his heirs, and could only be divested by their voluntary conveyance, or an order of court in a proceeding to which they were parties defendant. The mere fact that the complainant and her husband entered their appearance in that suit and consented to a decree as prayed in the bill could not affect the legal title. The decree of the circuit court in this case does

not purport to adjust the account between the parties nor to pass upon the question whether the Statute of Limitations has run against it or not, but simply finds that the deed from Orr to William Davis is void and a cloud upon the title of complainant, and enjoins the further prosecution of the suit in forcible detainer.

Complaint is made by appellants that the decree did not go further and determine the rights of the parties on the mortgage, and counsel for appellee contend in their argument that the evidence in the record sustains the allegations of the bill as to usury, payment of the debt and the bar of the statute; but we are not called upon to decide the case not presented by the decree of the court below for our decision. We think, however, that the circuit court very properly, on the issues made upon this bill, confined its decree to the one question, thus leaving the parties upon a bill to foreclose the mortgage, or other proper proceeding, to determine those questions. Its decree will accordingly be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* A. Phillips *et al.*

v.

DRAINAGE DISTRICT No. 5, etc.

Opinion filed October 24, 1901.

DRAINAGE—*party voluntarily connecting with drainage ditch subjects only his own land to be taken into district.* Owners of land adjoining a drainage district do not, by deepening the ditches on their own lands so as to connect with the ditches of the district, subject the lands of other parties which drain through such deepened ditches to be taken into the district, as in case of voluntary connection with the ditches of the district under the statute.

WRIT OF ERROR to the Circuit Court of Douglas county; the Hon. W. G. COCHRANE, Judge, presiding.

JOHN H. CHADWICK, State's Attorney, and EDEN, MARTIN & EDWARDS, for plaintiffs in error.

ECKHART & MOORE, for defendant in error.

Mr. CHIEF JUSTICE WILKIN delivered the opinion of the court:

This is a writ of error to the circuit court of Douglas county to reverse a judgment rendered against plaintiffs in error, as relators, in a *quo warranto* proceeding.

Drainage district No. 5 in the township of Bourbon, Douglas county, was organized August 29, 1898, for the purpose of digging a large ditch from the county line between the counties of Douglas and Moultrie, east of the Okaw river, and the district then comprised only lands lying east of the county line. On the 9th of March, 1900, by order of the commissioners of said district a large body of land lying west of the county line, belonging to the several plaintiffs in error, was taken into the district, upon the ground that they, after the organization of district No. 5, had connected the ditches on their lands with the ditches of the district, the order being entered, as is claimed, by virtue of the authority vested in the board by section 42 of chapter 42 of our statutes. (Hurd's Stat. 1899, p. 697.) That section provides: "Nothing in this act shall be construed to forbid land owners within the district to more completely drain their lands by using the common drains as outlets to lateral drains; and the owners of land outside the drainage districts or another drainage district may connect with the ditches of the district already made, by the payment of such amount as they would have been assessed if originally included in the district, or if such connection shall, by increase of water, require an enlargement of the district ditches, then the outside owners of land so connecting, or other drainage district, as may be, shall pay the cost of such enlargement. If individual land owners outside the district shall

so connect, they shall be deemed to have voluntarily applied to be included in the district, and their lands benefited by such drainage shall be treated, classified and taxed like other lands within the district," etc. The land owners whose lands had thus been annexed to the district, as relators, began this proceeding to compel the district to show cause why it exercised jurisdiction over their lands. The respondent filed pleas to the information, alleging that relators had voluntarily attached their ditches and drains to those of the district. Relators replied denying the allegations, and upon that issue the cause was submitted to a jury. The jury was directed to make a separate finding as to each relator, which it did, in each instance replying "yes" to the inquiry whether each relator (naming him) connected his drains with the ditches of the district. Motion for new trial was urged but overruled, and judgment entered against relators, who prosecute this writ of error.

The issue upon the trial was strictly one of fact,—that is, did the relators connect their drains with the ditches of the respondent district. The evidence in support of the affirmative of this issue, except as to Helmuth and Miller, is somewhat vague and uncertain,—at least as to some of the proprietors lying west of Helmuth and Miller. It was important, therefore, to the parties that the jury be accurately instructed.

Plaintiffs in error insist that the court below erred in modifying certain instructions asked by them and in giving others at the instance of the respondent. We have carefully examined the modified instructions complained of and find no substantial error therein; but one of those given on behalf of defendant in error (No. 10) is, we think, erroneous and misleading, and for that reason the motion for new trial should have been sustained. The lands of relators Helmuth and Miller lie immediately west of the new district, and the water-course through which the water is drained from all of the other lands of relators

passes east through the lands of Helmuth and Miller on its way into district No. 5. The instruction complained of is as follows:

"If the jury believe, from the evidence in the case, that since the organization of district No. 5 of the town of Bourbon, that Helmuths deepened the ditch through their lands in section 34, and that the relator Samuel Miller cleaned out and deepened the ditch on his lands in section 13 that connected with the said ditch on the lands of said Helmuth, and that the ditch so deepened on the Hulmuth land led to and connected with a water-way on the highway separating the lands of said district from those of said Helmuth, and that the said water-way across the highway connects with and empties into the ditch of the district, and that the ditches on the land of said Miller and said Helmuth which werè deepened, (if you believe, from the evidence, they were deepened,) carried water into the ditch on the highway and that it passed through said highway ditch into the ditch of the district, all of which water would not have reached said district ditch but for the deepening of the said ditches on the lands of said Miller and Helmuth, and that waters from lands of other relators flowed through said improved ditches and into the district ditch, then the lands of said Helmuth and Miller, and all lands of other relators lying above the lands of said Miller which drain their waters through the improved ditches on Miller and Helmuth, should be treated as connected with the ditches of the district."

This instruction, it will be perceived, informs the jury that Helmuth and Miller, by deepening the ditch on their lands, could subject all the lands of other relators which drained through such deepened ditches to be taken into district No. 5. This clearly is not the law. Under section 42 Helmuth and Miller had a right to drain their own lands into the new district and thus voluntarily connect with it, but their act, alone, could not have the effect of

bringing the lands of others within the jurisdiction of the district. (*Dayton v. Drainage Comrs.* 128 Ill. 271.) This instruction relieved the respondent from showing that the lands of other relators had been voluntarily connected with the ditches of the district, and the jury, following it, might well have ignored the evidence as to the individual acts of such other relators, and found, as they did, that the evidence satisfactorily showed that each of the other relators had connected his land with the ditches of the respondent district. It is true that other instructions given at the instance of respondent recognize the law to be that the proprietors must themselves do some act by which they voluntarily connect their lands with a district; but this tenth instruction is so direct and positive in its terms, and so clearly misstates the law, that such other instructions cannot be held to cure it. It is true, the jury found that each relator connected his ditch with the ditch of the new district; but they may have so found upon the theory that Helmuth and Miller had deepened the ditches through their lands, and that the waters from lands of the other relators flowed through said improved ditches and into the district ditch, although each of the other relators did nothing to cause the waters from his land to thus flow through the deepened ditches on the lands of Helmuth and Miller. In other words, under this instruction, if the jury believed, from the evidence, that Helmuth and Miller had deepened the ditches on their lands, and that the waters from the lands of other relators flowed through such deepened ditches into the district, then it was wholly immaterial whether such owners had done anything to connect their lands with the ditch of the respondent or not.

We perceive no error in the giving or refusing of other instructions, but for manifest error in instruction No. 10 the judgment below must be reversed and the cause remanded for another trial.

Reversed and remanded.

JOHN SCOTT, Jr.

v.

WILLIAM SCOTT.

Opinion filed October 24, 1901.

1. **WILLS**—*when fact of advancements and amounts must be established by extrinsic evidence.* Under a will providing that "whatever notes and unsettled accounts I may hold at the time of my death against my son William shall be considered as advancements to him," etc., the fact of the existence of such notes and accounts, and amounts thereof, must be established by competent evidence before they can be charged as advancements to the son.

2. **EVIDENCE**—*when declarations of testator as to advancements are not admissible.* Where a will does not specify what notes or accounts, or the amounts thereof, are to be deducted from a son's share as advancements, but merely states that whatever notes and unsettled accounts the testator holds against his son at the time of his death shall be so considered, declarations of the testator made to his attorney and others who were present when the will was made, but not in the presence of the son, as to the amount of such notes and accounts, are not admissible; nor can they be considered competent as part of the *res gestæ*.

3. **SAME**—*when presumption that a son destroyed evidence of advancements cannot arise.* Evidence that a son had possession of his father's papers shortly after his death and deposited them in a bank does not give rise to a presumption that he destroyed or suppressed notes and books showing amounts advanced to him by his father, where there is no competent evidence showing that such notes and books existed.

WRIT OF ERROR to the Circuit Court of Henry county;
the Hon. HIRAM BIGELOW, Judge, presiding.

WILLIAM LAWSON, for plaintiff in error.

WILSON & MOORE, and N. F. ANDERSON, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This writ of error was sued out to reverse a decree of partition rendered by the circuit court of Henry county. The parties claim title under the will of their father,

John Scott, who died June 27, 1887, owning the land in controversy, a farm of 371 acres, situated in said county. The will was admitted to probate July 9, 1887, and letters testamentary were thereupon issued to James C. Smiley, as executor. The use and income of this land were given by the will to Marcy Scott, the testator's widow, during her life. After making other bequests and devises the will provided:

"*Seventh*—After the death of my said wife I give and devise my farm in Kewanee township, aforesaid, to my sons, Alexander, William and John, provided, however, that whatever notes and unsettled accounts I may hold at the time of my death against my said son William shall be considered as advancements to him and deducted from his share of said farm, but shall not be reckoned at all against his share in my personal estate above bequeathed to him."

The widow died in August, 1898, and this bill was filed about a month later by John Scott, Jr., one of the devisees, for a partition of the farm. Alexander Scott, one of the devisees, died after the death of his father, and devised his share of said lands to his widow, Sarah E. Scott, during her life, with remainder in fee to his daughter, Luella Keezler.

William Scott denied that his father held any note, notes or account against him, and no such note or account was produced or found after the testator's death, although the executor searched and inquired of the widow for them but learned nothing regarding them; no such note or account was included in the inventory, and it does not appear that any legal proceedings were taken by the executor, or any person interested in the estate, during its administration or during the lifetime of the widow, nor until this bill was filed, to establish the existence or the loss or destruction of any such note, notes or account. The widow lived eleven years after the testator's death. It is to be observed that the will itself

does not determine the existence, at the testator's death, of any such notes or accounts which were to be charged as advancements to William, but left that fact to be established by proof *aliunde*. It was therefore necessary to establish by competent evidence that the testator held such notes or accounts at his death, and the amount of them, before they could be charged as advancements to William. An effort was made to do this on the trial of this case, but the court below sustained exceptions to the master's report, and found by the decree that William Scott was not indebted to his father, the testator, in any sum whatever, at the time of the father's death, and that his distributive share cannot be charged with any such indebtedness. Interpreting this as a finding that the testator did not, at his death, have or hold any note, notes or unsettled account against his son William, we are constrained, after a full consideration of the competent evidence in the record, to sustain the finding. The burden was on the complainant to establish such note or notes and accounts, and their amount; but this burden was not sustained.

It was proved before the master by the attorney and others who were present when the will was executed by the testator, about twelve hours before he died, that he spoke of his transactions with William and the money he had let William have, and said that he had William's note for \$6500, and that there was something on the books, but he did not know how much. This testimony was incompetent and was properly disregarded by the chancellor. The testator could by his will have deducted that amount, or any other he might have deemed just, from what might have been supposed to be William's share in the estate, but as he did not do so by the will it can not be done by the courts upon the mere declaration of the testator made at the time the will was executed. The question here is not whether the will may be varied by parol evidence, but, conceding that the will itself has

left the fact that the testator held such note or notes and accounts to be established by parol, the question is whether the declarations of the testator, made when the will was executed, that he had such a note and account, may be proved to establish such fact. We are of the opinion they were not admissible, but were incompetent. William Scott was not present, and his rights under the will, fixed by the death of his father, could not be affected by proof of such declarations. The fact necessary to be established, that the testator held such note and account, could be proved only by competent evidence, as in other cases. It could not be contended, in a suit by the executor to recover an indebtedness evidenced by such a note or account, that the declarations of the payee or creditor would be admissible in favor of the estate. Upon the same principle they are not admissible here to charge the devisee.

It is contended, however, that these declarations of the testator were a part of the *res gestæ*, and therefore admissible. We are of a different opinion. The declarations were of the principal fact that he had such a note, and were not merely incidental to or explanatory of such principal fact. No note or account was present at the time of the execution of the will, and the declarations then made did not tend to identify them or to characterize his possession of them. Nor were they offered to explain any latent ambiguity arising from an interpretation of the will in relation to its application to the subject matter of it, but they were offered as original evidence of the principal fact, which, it must be assumed from the will, the testator left to be established according to the rules of evidence. (2 Jones on Evidence, sec. 354; *Charter v. Lane*, 62 Conn. 121; *Abney v. Kingsland*, 10 Ala. 355; 44 Am. Dec. 491, and notes.) See, also, *Martin v. Martin*, 174 Ill. 371, where it was shown that the holder of a note had the possession of it, and it was held proper to prove declarations by her, relating to such possession, claiming

ownership of the note, but not such as related to past transactions.

Sarah E. Scott also testified that about seventeen years before the trial, when she and her husband, Alexander Scott, were living with the testator and his wife on the farm, the testator called her into the room where he had a lot of notes, and when he came to the eleventh one he read it as and said it was a note for \$6500 against William; that she saw the note and the signature to it, and that it was written for \$6500, but that she did not know William's handwriting. She did not testify whether William's name was signed to the note or not. William Scott testified that his father did not hold any note or account against him at the time of his death. There was evidence tending to prove that shortly after the death of his father William obtained possession of his father's notes and papers and deposited them in a bank, and counsel for plaintiff in error contends that from that fact, and the other evidence in the case, it should be presumed that he destroyed or suppressed the note and book showing the account against him. As there was not, in our opinion, sufficient competent evidence in the record to prove that the testator held any note or book account against William Scott at the time of his death, the chancellor would not have been warranted in finding that said William had suppressed or destroyed any such note or account. It does not appear from the record that the facts bearing upon the question at issue were fully elicited, and the chancellor could not supply by inference that which it was necessary to establish by proof. The most that can be said is, that the competent evidence in the record on behalf of plaintiff in error is too indefinite and inconclusive to sustain the finding of the master, or any decree other than the one rendered on the hearing.

The decree will be affirmed.

Decree affirmed.

THE ST. LOUIS AND BELLEVILLE ELECTRIC RAILWAY CO.

v.

GUSTAVE VANHOOREBEKE *et al.**Opinion filed October 24, 1901.*

1. **SPECIFIC PERFORMANCE**—*agreement to convey right of way to railroad company may be specifically enforced.* An agreement to convey a right of way to a railroad company having lawful power to make the same stands upon the same footing as other contracts, and will be specifically enforced in a proper case.

2. **SAME**—*what does not justify refusal to convey right of way.* Refusal to convey a right of way under a contract is not justified by the fact that the company, in constructing its road-bed, excavated within the limits of its right of way for dirt to elevate the road-bed, thereby causing water to stand, at times, in the excavations, since the damage so accruing is regarded as having been considered in making the contract.

3. **RAILROADS**—*a railroad company acquires same rights by contract as by condemnation.* A railroad company acquires the same rights and privileges under a contract relating to its right of way and the construction and operation of its road as in cases where such right of way is acquired by the exercise of eminent domain.

APPEAL from the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

This is a bill for specific performance and to enjoin an action of ejectment, filed on January 20, 1900, by the appellant company against the appellees, Gustave VanHoorebeke and Given Campbell. The appellees answered the bill, denying the material allegations thereof. Upon a hearing of the cause, the bill was dismissed for want of equity by the trial court at the cost of appellant; and a temporary injunction theretofore granted was dissolved. The present appeal is prosecuted from said decree.

The bill in the case alleges that the complainant therein, the St. Louis and Belleville Electric Railway Company, is a railroad corporation organized under the general Railway act of the State of Illinois; that it was organized for the purpose of building and operating a double track electric railway between the cities of East

St. Louis and Belleville in St. Clair county, and has built, and is operating, said railway between said points; that defendants, the present appellees, before the construction of said railway, owned a tract of land east of and adjoining the village of Winstanley Park and south of the St. Clair county turnpike; that said land was in a direct line with the proposed railway; that, on September 18, 1897, the complainant and defendants entered into a written contract by the terms of which it was agreed as follows:

That, for and in consideration of the cash sum of one dollar in hand paid to said parties of the first part (appellees) by the said party of the second part (appellant), and for the further consideration of the benefits to be derived by the parties of the first part from the construction and running through their lands of a double track electric railway, and for the further consideration of the performance of the conditions thereafter set forth, the parties of the first part thereby agreed to transfer to the party of the second part, its successors or assigns, by proper conveyance, the clear, unobstructed right of way across and through the lands of the party of the first part, described as a part of survey number seven hundred and seventy-seven (777) east of and adjoining Winstanley Park and south of the Belleville rock road so-called in St. Clair county; said right of way to be one hundred feet wide, fifty feet on each side of the center line of said railway, as now located and shown on the map or plat of said railway attached to said contract.

By the terms of said agreement, "it is expressly understood and agreed that this contract is made upon the express condition that the said party of the second part, its successors or assigns, shall, within twelve months from the date hereof, completely grade for a double track electric railway on said right of way, and shall, on or before the first day of May, A. D. 1899, construct and operate continuously, regularly and daily a double track

electric railway on said right of way, and that said right of way shall only be used for electric railway purposes and none other." By the terms of the contract, "it is further understood that no conveyance of said right of way shall be made until said grade is finished, and the electric railway aforesaid in daily operation over said right of way, but the right to enter and grade and build the same is granted the party of the second part, its successors or assigns, and unless said grading is finished within the time specified of twelve months aforesaid, and said electric railway shall be completed and in daily operation over said right of way on or before the first day of May, 1899, possession shall be surrendered by said electric railway company, or its successors or assigns, if taken thereunder, to said Campbell and VanHoorebeke, their heirs or assigns, and this instrument shall become null and void; and if at any time said electric railway company, its successors or assigns, shall fail or neglect to continuously operate said electric railway over said right of way, then their possession of said property shall at once cease, and the same shall revert to said Campbell and VanHoorebeke."

The bill alleges, that the appellant complied with all the terms and conditions named in the agreement. The bill further alleges, that the appellees have refused to make appellant a deed of conveyance for said right of way in accordance with said agreement, and have instituted an ejectment suit to eject appellant from the right of way described in said agreement.

On May 15, 1899, the appellees addressed a letter to appellant in which, after reciting a portion of said agreement of September 18, 1897, it is said: "Now, inasmuch as you have failed, on or before the first day of May, 1899, to construct and operate continuously, regularly and daily a double track electric railway on said right of way, we hereby declare said agreement of September 18, 1897, to be null and void, and hereby notify you to

vacate said right of way and surrender possession thereof to the undersigned without delay." This letter was received on the next day after it was written, to-wit, May 16, 1899.

HAMILL & BORDERS, for appellant.

GIVEN CAMPBELL, and G. VANHOOREBEKE, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill, filed by a railway company to enforce the specific performance of a contract to convey a right of way, one hundred feet wide, through a tract of land, containing between seventy and eighty acres. The case is considered upon the assumption as to the power of the company, made by counsel on both sides, as hereinafter indicated.

Where a railroad company enters into a contract or agreement for the conveyance of a right of way, which it has the lawful power to make, such contract, when made, stands on the same footing as other contracts, and, in proper cases, a bill for its specific performance will be sustained in equity. (19 Am. & Eng. Ency. of Law, p. 856). Where such a corporation, having power under the law to do so, enters into an ordinary contract with the owner for the sale and purchase of land to be used for a right of way, a court of equity can decree a specific performance of such contract. (Pomeroy on Contracts, —2d ed.—sec. 32; *Ross v. Chicago, Burlington and Quincy Railroad Co.* 77 Ill. 127; *C. & S. W. R. R. Co. v. Swinney*, 88 Iowa, 182; *Boston and Maine Railroad Co. v. Babcock*, 3 Cush. 228).

The appellees oppose the specific performance of the contract, made by them, upon two grounds: *First*, upon the alleged ground, that the defendant did not finish the grading of the road, and construct and operate the road,

within the times limited by the contract of September 18, 1897; *second*, upon the alleged ground, that the appellant so constructed the road, or so made use of that portion of the right of way lying outside of the railroad bed, as to injure and damage the balance of the tract of land belonging to appellees, out of which the right of way was taken.

First—It is claimed by the appellees, that the appellant did not finish the grade or grading of the road within twelve months from the date of the contract, that is to say, by September 18, 1898. It is also contended by the appellees, that appellant did not on or before the first day of May, 1899, construct and operate continuously, regularly and daily a double track electric railway on said right of way. It is not claimed that said right of way has been used for any other than electric railway purposes.

It is clear, under the authorities above referred to, and upon the assumption heretofore and hereinafter indicated, that, if the appellant has complied with the conditions of its contract, it is entitled to a specific performance of the same. We think, after a careful examination of the evidence, that the appellant has complied with the terms of its contract. The grading of the road for a double track electric railway was substantially, if not completely, finished within one year after September 18, 1897, that is to say, by September 18, 1898. Also, a double track electric railway was constructed on said right of way and operated continuously, regularly and daily by the first day of May, 1899. It is unnecessary for us to discuss or analyze all the testimony upon this subject. The witnesses upon the part of the appellant are John A. Day, president of the appellant railway company; James A. Tiernan, chief engineer for the railway company and a civil engineer by profession; and A. C. Thompson, superintendent of the railway company, who also superintended the construction of the power house

and line work of the road. These witnesses testify from actual knowledge, that the grading and construction and operation of the road were finished within the time specified in the contract. The only testimony on the other side is that of the appellees, VanHoorebeke and Campbell, who were not present at the construction of the road and knew nothing about its construction and operation until after the road was finished.

The appellees are lawyers by profession. The contract of September 18, 1897, was drawn by Mr. Campbell himself. Their testimony, so far as it is contradictory of the three witnesses for the appellant, merely relates to conversations claimed to have been had, in the course of negotiations between the parties after May 15, 1899, with one or more of the officers of the appellant company.

It is admitted by the appellees themselves in their brief filed in this case, that the road was finished and in operation on May 20, 1899. Appellees say in their brief: "From the evidence it is clear that there was no operation of this road 'continuously, regularly and daily, of a double track railway' as contemplated by the contract, until May 20, 1899, and after." We do not deem it necessary to discuss the question, whether time is made of the essence of the contract here in controversy or not. There is no express stipulation in the contract, which in terms makes time of the essence of the contract. If time is of its essence, it is only impliedly so, and because its terms indicate such to have been the real intention of the parties. (*Miller v. Rice*, 133 Ill. 315). The evidence shows clearly that, by the first day of May, 1899, appellant had expended in the construction of this road, including the right of way over the land of appellees, the sum of about \$400,000.00. The evidence of one of the appellees shows that, if there was any failure on the part of appellant to complete the construction and operation of the road by the first day of May, 1899, such failure was known to appellees on that date. Mr. Campbell says in his testimony:

"Somebody told me about the first of May, 1899, that they had thrown up a high embankment over my land and the cars were not running." Notwithstanding this knowledge, appellees waited until the 15th day of May before making any objection or complaint on account of the supposed default of the appellant. Upon that day, or the next day, they gave notice, declaring the agreement of September 18, 1897, to be null and void, and notifying appellant to vacate the right of way and surrender the possession to them.

It will be observed that the notice, given by the appellees on May 15, or May 16, 1899, does not call upon the appellant to finish the road or its construction or operation within any fixed time, whether reasonable or not. It, in substance, declares an absolute forfeiture of the contract, notwithstanding the admission by the appellees themselves that the road was completed, and in full operation, by the 20th day of May, 1899.

A court of equity abhors forfeiture. In *Voris v. Renshaw*, 49 Ill. 425, we said (p. 433): "The law does not favor forfeitures, and their prevention is within the protecting care of equity, whenever wrong or injustice will result from their enforcement; and to prevent their enforcement affords a large share of equity jurisdiction. * * * Inasmuch as equity does not favor forfeitures, but refuses to enforce them, unless it be to promote justice, and to prevent the perpetration of injustice and wrong, a clear case, appealing to the principles of justice, must be made out before a forfeiture will be enforced in that tribunal."

While it may be true that the formal opening of the road did not take place until May 20, 1899, the evidence shows that the grading was completed within the year specified in the contract, and that the road was operated, certainly as early as May 1, 1899, and before that time, by the running of one or more construction cars upon the track, which construction cars also carried passengers. Appellees permitted appellant to take possession of the

ground, which they agreed to convey to it for a right of way, and to spend an immense amount of money in grading the road, in laying rails, in building a power house, in erecting poles necessary to hold the wires used in the construction of an electric railway, in stringing the wires, and in otherwise perfecting the construction of the road. They permitted appellant to do this for fifteen days after they knew of what they claim to have been a default on the part of appellant. Under these circumstances, it certainly would be a great wrong and injustice to the appellant to enforce a forfeiture of this contract.

Second—The second ground, upon which the appellees refuse to comply with the contract to convey the right of way, is that appellant has injured the balance of their property by the way, in which the road has been constructed. The evidence shows, that the land, belonging to appellees, was low and subject at times to overflow. There was a lake near it, the waters of which sometimes backed up upon the land. In order to construct a road-bed across the land, it was necessary to raise the road-bed above the level of the land on either side of it. In other words, the grading of the road was necessarily from two to four feet above the surface of the ground. The character of the ground was well known to the appellees, who were the owners of it, and it must have also been known to them, that the construction of the road-bed in the manner thus indicated was made necessary by the character of the land itself.

In order to get earth or dirt for the construction of the road-bed, appellant was obliged to make excavations or dig ditches alongside of the road-bed. These ditches, when the water backs up upon the land, are filled with water. Appellees complain that, on account of these ditches, and on account of the elevation of the road-bed above the surface of the ground, it is impossible for them to cross the right of way, agreed to be conveyed to appellant, from one part of their land to another. As we

understand the evidence, no fault is found with the construction of the road itself. The complaint is, that the ditches were dug, and that they are filled at times with water. It is to be observed, however, that these ditches are not dug upon the land of appellees, but within the one hundred feet, constituting the right of way, which appellees agreed to convey to appellant. The elevation of the road-bed, and the digging of the ditches made necessary in order to get earth for the construction of the road-bed, were acts performed by appellant upon its own ground, or the ground for which it held a contract of purchase. Appellees furthermore claim that their land is so located as to be easily made into a subdivision, consisting of lots, blocks and streets. The evidence shows that the tract of land, from which the right of way is taken, has been under cultivation as farm land, and that fifteen acres of it have been used as a pasture. There is no proof whatever that any subdivision was ever made of the land, or that it was ever platted into lots or blocks, or streets, or alleys. If the appellees desired to reserve the right to build crossings across the right of way, and across the road-bed of the appellant, they should have embodied such a provision in the contract. There is, however, no such provision in the contract.

Appellees complain that, north of the right of way agreed to be conveyed to the appellant, there is a strip of land belonging to them only sixty feet wide, and that this strip is practically made useless to them by the construction of the road. It appears from the evidence, however, that a map or plat of the railway was attached to the contract itself, which showed that a narrow strip of sixty feet would remain north of the road-bed. Appellees were fully advised of this fact, therefore, before entering into the contract.

Appellees seem to regard their contract as one, which provides for the laying of tracks by a street railroad company in a street where access can be had to the cars

at every crossing. But, here, there was no street, and there was an agreement for an absolute conveyance to the appellant of a clear, unobstructed right of way, one hundred feet wide, across the land of the appellees. Under the statute, in pursuance of whose provisions the appellant company claims to have been organized, and whose organization thereunder is not denied by appellees, appellant would have the right to fence its right of way. The matter of crossing the right of way and of crossing the road-bed is a subject for future consideration.

We are of the opinion, that the elevation of the road-bed above the surface of the ground in the manner above stated, and the settling of water in the places, where appellant has made excavations for dirt to construct its road-bed, are not circumstances, which justify the appellees in refusing to comply with their contract. Such damage, as may accrue to the land of appellees from these circumstances, must be regarded as having been taken into consideration when the contract to convey was made. They merely create a difficulty of access from one part of the land to another. (*Chicago Terminal Railroad Co. v. Bugbee*, 184 Ill. 353).

Where a railroad company obtains a right of way by purchase from the land owner, having power under the constitution and law to do so, all the incidents attach to such right as are acquired by eminent domain when the right of way is obtained by condemnation, it being conceded or established that such company can lawfully exercise the power of eminent domain. In other words, a railroad company acquires the same rights and privileges under a private grant as to the construction and operation of its road, as under a right of way acquired by condemnation, where it has the power, under the law, to receive by grant and to acquire by condemnation. Had this right of way been lawfully acquired by condemnation, appellees would have received compensation for the value of the strip of land, and also an assessment of all

damages to the residue of their tract to result from the construction and operation of the road. "The rule is, that the appraisal of damages in a case of condemnation embraces all past, present and future damages, which the improvement may thereafter reasonably produce." (*Chicago, Rock Island and Pacific Railway Co. v. Smith*, 111 Ill. 363). Here, the strip of land is, by the terms of the contract, to be conveyed for the purpose of a railroad right of way, and for the purpose of constructing and operating thereon a double track electric railway. Hence, the contract is to be construed, under the assumption hereinafter specified, as permitting and authorizing the use of which the appellees complain. As was said in *Chicago, Rock Island and Pacific Railway Co. v. Smith*, *supra*: "A mere conveyance of a tract of land might not give to the grantee the right to make any use of it, which would injuriously affect any other land, for the law would attach the same condition as in general exists with respect to the holding of all land,—that the owner shall so use it as not to produce injury to another; but, in the case before us, there is the grant for this very use itself which will injuriously affect other land, and for no other use."

In *Conwell v. Springfield and Northwestern Railroad Co.* 81 Ill. 232, it was held that, where a party executes a contract with a railway company, agreeing to release and convey a right of way for its road over any lands owned by him, as soon as the road is located, he will not be entitled to any damages by the construction of the road over any of his lands. The doctrine is thus stated by the Appellate Court of this State in *Illinois Central Railroad Co. v. Anderson*, 73 Ill. App. 621: "Cases between a railroad company and a grantor or condemnee fall in the same class. In such cases, the consideration for the grant or the damages assessed on condemnation include, once for all, the full compensation to be paid for any lawful use that fairly falls within the terms of the grant or the specifications of the condemnation."

It is true that, in the present case, the appellees did not receive, as consideration for the contract, an amount of money equal to the value of the strip of land to be conveyed. The consideration is expressed to be one dollar in hand paid, and the benefits to be derived by appellees from the construction and running through their lands of a double track electric railway, and for the further consideration of the performance of the conditions already mentioned. The benefits, here referred to, are the general benefits to result from the construction of the road. Wherever a special benefit is to be derived, as from the construction of a depot at a particular place, or from the location of a crossing over the road-bed at a particular point, it should be specified in the contract itself; but this was not done in the present case.

Where a right of way is purchased by a railroad company, the same duty as to the construction of its road and the building of necessary culverts, embankments, fences, etc., rests upon the company, as would have existed if the land had been taken under the right of eminent domain. (*Hortsmann v. Covington, etc. Railroad Co.* 18 B. Mon. 218; *Smith v. New York, etc. Railroad Co.* 63 N.Y. 58).

Upon the whole, after a careful consideration of this record, we are of the opinion that the appellant was entitled to a decree, specifically enforcing the contract made with it by the appellees, and that the circuit court erred in dismissing the bill. Nothing herein contained, however, is intended to conflict with the doctrine of the following cases: *Harvey v. Aurora and Geneva Railway Co.* 174 Ill. 295; *Dewey v. Chicago and Milwaukee Electric Railway Co.* 184 id. 426; *Aurora and Geneva Railway Co. v. Harvey*, 178 id. 477. In this case, counsel on both sides assume that this electric railway company has power to receive a donation or conveyance of a right of way, and to condemn land for such right of way. We pass no opinion upon this subject, as it is not a contested question; but have considered the case as presented by counsel.

When a disputed question arises as to the existence of such power, we do not intend to be cut off from considering it by anything here said. We merely hold that, assuming such power to exist because counsel on both sides seem to concede it in this case, we do not think that appellant has so failed to perform its contract, or has performed it in such an improper manner, as to justify appellees in refusing to execute a deed to it.

Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

E. G. CRANE

v.

J. W. EDDY, for use, etc.

Opinion filed October 24, 1901.

BROKERS—*when real estate broker is entitled to commission.* If a vendor agrees with a broker to pay his commission in proportionate amounts as the balance of the purchase money is paid, but after paying a portion of the purchase money the vendee becomes insolvent and the vendor forecloses his security, bidding the full amount due him and executing a receipt to the master in full satisfaction of the debt and interest due him under the decree, he is liable, under his agreement, to pay the broker's commission, the same as if the vendee had continued to make his payments.

Crane v. Eddy, 93 Ill. App. 569, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. HENRY B. WILLIS, Judge, presiding.

A. J. HOPKINS, F. G. HANCHETT, FRED A. DOLPH, and R. B. Scott, for appellant:

An agent may so contract as to make his compensation dependent upon a contingency, and to recover must

show that the contingency has happened. 1 Am. & Eng. Ency. of Law, (2d ed.) 1096; *Zerrohr v. Dittson*, 117 Mass. 553; *Worden v. Dodge*, 4 Denio, 159.

An agent's compensation is determined exclusively by the agreement. 1 Am. & Eng. Ency. of Law, (2d ed.) 1095; *Hoyt v. Shipherd*, 70 Ill. 309.

This instrument was payable out of a specific fund, and where there is a failure of the specific fund there can be no recovery. *Turner v. Railroad Co.* 95 Ill. 134; *Wickersham v. Beers*, 20 Ill. App. 247.

"Purchase money" is money paid for the land. *Kimble v. Esworthy*, 6 Ill. App. 520; *Austin v. Underwood*, 37 Ill. 438.

Where purchase money is the consideration of one instrument it will so continue in any other. *Kimble v. Esworthy*, 6 Ill. App. 520.

The giving of the mortgage for purchase money and the giving of the deed were one transaction. *Lehndorf v. Cope*, 122 Ill. 333.

At law the title did not pass out of Crane, hence no sale and no purchase money paid. *Seaman v. Bisbee*, 163 Ill. 91; *Barrett v. Hinckley*, 124 id. 32; *Waughop v. Bartlett*, 165 id. 130; *Esker v. Heffernan*, 159 id. 38.

FRANK G. PLAIN, for appellee:

A contract is construed most strongly against the party who executes it. *Chicago Sugar Refining Co. v. Armington*, 67 Ill. App. 538; *McCarty v. Howell*, 24 Ill. 342.

Where the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have by their own conduct placed a construction upon it which is reasonable, such construction will be adopted by the court. *Hamilton v. Scully*, 118 Ill. 192; *Work v. Welch*, 160 id. 468; *People v. Murphy*, 119 id. 160.

The foreclosure of the trust deed, and the purchase at the foreclosure sale by Crane of the property there sold at a price equal to the amount of his claim, with interest and costs, is, in law, payment of the purchase

money of such property, carrying with it the duty to pay the balance still unpaid upon the instrument sued on in this case. *Davis v. Dale*, 150 Ill. 239; *Hopkins v. Hemm*, 159 id. 416; *Digby v. Building Ass.* 60 Ill. App. 644; *Hood v. Adams*, 124 Mass. 481; *Babcock v. Loan Ass.* 67 Minn. 151; *Koerner v. Gauss*, 57 Ill. App. 671.

The purchase money to be paid for or the debt created by the purchase of the farm by Jernberg was secured by the trust deed to Curry. This trust deed secured the debt, and not the note or bond, or other evidence of it. When the trust deed was foreclosed and the property was sold by the master to Crane, the debt created by the purchase of the farm by Jernberg was paid and satisfied, and in contemplation of law the purchase money for the farm was paid. 1 Jones on Mortgages, (5th ed.) sec. 924; *Wayman v. Cochrane*, 35 Ill. 155; *Flower v. Elwood*, 66 id. 438; *Elliott v. Blair*, 47 id. 342.

A debt secured by mortgage or trust deed upon land is paid and discharged when the holder of the debt becomes invested with the title of the mortgaged premises. *Bank v. Reis*, 136 Ill. 249; *Closs v. Boppe*, 23 N. J. Eq. 270.

A principal who agrees that his agent shall receive a percentage of money or commission to be paid upon a contract secured through such agent cannot dispose of his own right to receive the fund, and thus deprive the agent of the reward for his services. *Reed v. Insurance Co.* 61 Pac. Rep. 21.

PER CURIAM: In deciding this case on appeal from the circuit court of Kane county the Appellate Court rendered the following opinion:

"This was a suit by Eddy against Crane to recover upon an instrument dated April 8, 1892, signed by Crane, the body of which was as follows: 'Due J. W. Eddy, or order, eight hundred fifty-four dollars and twenty-four cents as his commission on sale of my farm to A. Jernberg. The same to be paid out of the purchase money as

it is paid to me on the various payments, in proportionate amounts, with interest at six per cent per annum.' A suitable amended declaration was filed, the general issue was pleaded, and there was a stipulation defendant might prove all defenses thereunder. A jury was waived and the facts were agreed upon. The court rendered judgment for plaintiff for \$817.42, and defendant appeals.

"Crane owned a farm and Eddy was a real estate broker. Prior to April 8, 1892, Eddy had been endeavoring to sell Crane's farm, and on that day he negotiated a sale thereof to A. Jernberg, and Crane deeded the premises to Jernberg. The amount of cash paid down is not shown, but for the deferred payments Jernberg executed five notes to Crane for different amounts, aggregating \$10,377, due at various dates from December 31, 1892, to May 10, 1896, with interest at six per cent per annum before and seven per cent after maturity, and secured said notes by a trust deed on the land to J. O. Curry, trustee. The instrument in suit evidences the agreement of Crane to pay Eddy commissions for making the sale. Jernberg paid the first two notes, aggregating \$2306, and interest, and Crane released portions of the land from the trust deed. Jernberg failed to pay the last three notes when due, but became insolvent. Crane and Curry filed a bill to foreclose the trust deed, and obtained a decree finding due Crane on said notes \$9178.58, and directing the sale of the part not released. Pursuant to that decree the master in chancery advertised for sale that part of the farm not released, and at that sale Crane bid in the premises for \$9605.60, being the amount found due him by the decree and interest thereon, and costs and solicitor's fees. The amount due Crane at the time of that sale was \$9230.85, and he did not pay that sum in cash to the master and receive it back from the master, but, instead, executed and delivered to the master a receipt for the last named sum, in satisfaction of the debt and interest due him under the decree. The sale was confirmed. When

Jernberg paid the first two notes, Crane made proportionate payments to Eddy on the instrument in suit, and they were endorsed on the back thereof, the total of four payments so endorsed being \$307.02. After the foreclosure sale was approved Eddy demanded of Crane payment of the balance of the sum specified in said instrument, but Crane refused to pay.

"If any one else had bought at the master's sale and paid the money to the master, and the master had paid Crane the full amount of the decree in cash, it is clear that Crane would then have become liable to pay Eddy the balance unpaid upon the instrument here in suit, for the reason that he would thereby have collected all his purchase money in one of the ways provided for when the farm was sold. If Jernberg or any other person entitled had redeemed from the sale, clearly Crane would have been liable to Eddy for the balance unpaid upon this instrument. We fail to see why the fact that Crane chose to bid for the farm the full amount of the purchase money remaining unpaid, and the costs, and that no one raised his bid and no one redeemed from the sale, should produce a different result as to Crane's liability upon the instrument sued upon. Jernberg's notes and the purchase money debt they evidenced are fully paid, satisfied and discharged by the decree and sale to Crane. They have been satisfied in one of the ways Crane and Jernberg contracted they might be discharged.

"Again, there is no claim the farm is not worth all Crane bid for it. Suppose instead of bidding the full amount due himself he had let others bid, and if no bid was made let the sale be continued till another date. It cannot be assumed no one else would have offered a bid. If some one had bid a thousand dollars less and the sale had been effected, then, upon Crane's recovering nearly the entire amount due him, Eddy would be entitled to a proportionate amount of his commissions, leaving a small part, only, of his commissions not yet due, because a

small part of the purchase money was still uncollected. Because Crane did not let strangers get the farm at something less than the full amount remaining unpaid, but to protect himself bid the full amount and no one cared to bid more, is that precaution by Crane to defeat Eddy entirely? To state the proposition seems to us to show it cannot be just.

"There is another consideration arising from the record before us which appears decisive against Crane. When Jernberg paid the first two notes Crane caused the trustee to release part of the lands from the lien of the trust deed. It is not shown there was any provision in the trust deed that part of the land should be released when part payment was made, nor is it shown that Eddy consented to the release. All the land was security for each part of the debt. It may well be that if Crane had not released part of it the entire farm would have sold at master's sale to a stranger for the full amount due and Crane would have received payment in full in money. If no one would bid for the unreleased lands more than the entire amount remaining unpaid, that should not be permitted to injure Eddy, who is not shown to be responsible for or consenting to the release. We are of opinion that this case should be treated the same as if any other person had bid and paid the same amount; that the debt for the purchase money having been paid and discharged in one of the ways provided by the contract between the parties, Eddy is entitled to his pay."

The Appellate Court, in allowing the appeal, granted a certificate of importance.

After a careful consideration of this case we have arrived at the same conclusion as that reached by the Appellate Court, and are satisfied with the reasons given in the opinion of that court for the affirmance of the judgment of the circuit court. We therefore adopt that opinion as the opinion of this court, and affirm the judgment.

Judgment affirmed.

ABIGAIL H. BOWERMAN

v.

M. SESSEL, Exr.

Opinion filed October 24, 1901.

1. **WILLS**—*whole will should be considered in determining meaning of particular clause.* The whole will and all of its parts should be construed together to determine the true meaning of a clause containing a particular bequest.

2. **SAME**—*language of a will construed.* Under a will giving the homestead and household goods to the testator's wife for life, and providing that the executor shall convert all property into an interest-bearing fund, the interest to be paid to the wife, and if it amounts to less than \$50 a month resort to be had to the body of the fund, the homestead and household goods to be sold after the wife's death and the proceeds put at interest, and, after making specific bequests, leaving the balance of the estate to the wife, "to be distributed as she sees fit after her death," the wife takes the homestead and household goods for life, with the right of support from the fund, as provided in the will, and with the right to make testamentary disposition of any balance of the fund, including the proceeds of the sale of the homestead, remaining in the hands of the executor after he has paid the specific bequests.

APPEAL from the Circuit Court of Macoupin county;
the Hon. ROBERT B. SHIRLEY, Judge, presiding.

H. R. BUDD, (D. E. KEEFE, of counsel,) for appellant.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant, formerly the wife of Peter J. Hendgen, deceased, (now the wife of one Bowerman,) has perfected this appeal from a decree of the circuit court of Macoupin county construing the will of her said deceased husband. The will is as follows:

"I, Peter J. Hendgen, of Bunker Hill, Macoupin county, State of Illinois, being of sound health and body and of disposing mind and memory, yet mindful of the uncertainties of life, do make and publish this my last will and testament.

"I bequeath to my wife, Abigail H. Hendgen, the homestead and all the household goods in it, without any exception, the above properties are situated in the town of Bunker Hill, Macoupin county, Ill., during her natural life. I am not in debt at present, and I am certain I will not get in debt. I want my administrator, after paying all my debts and expenses of administration, to put all my property, real, personal and mixed, on interest on first-class securities or real estate, and to pay to my wife, Abigail H. Hendgen, all interest coming on my estate, and should the interest amount to less than \$50 per month then be taken from the capital, if necessary. And also should she be in need of any additional amount at any time, it is my desire that she shall have it, providing the administrator is satisfied she is in need of it. It is my will and desire that in no event shall any part of my estate fall in the hands of my wife's relations or my own. After my wife's death I want the homestead and household goods sold, and whatever belongs to her at the time of her death, sold without exception and whatever money received therefrom put on interest same as before mentioned. I bequeath to Phillipine Burmester, of St. Louis, Mo., daughter of John Louis Burmester, of St. Louis, Mo., one thousand (\$1000) dollars, to be paid to her when she gets eighteen years of age, including the interest what may have accumulated after my wife's death. I also bequeath to John Louis Burmester one thousand (\$1000) dollars, to be paid after my wife's death. I bequeath to the following institutions, as follows: German Protestants' Orphans' Home on Easton avenue, about ten miles from court house, St. Louis, one thousand (\$1000) dollars; the House of the Friendless, (Old Ladies' Home,) 4431 S. Broadway, St. Louis, one thousand (\$1000) dollars; the Methodist Orphans' Home, St. Louis, sit. on Maryland avenue, one thousand (\$1000) dollars; the Evangelical Deaconess, 4117 West Belle place, five hundred (\$500) dollars; the Good Samaritan Hospital, on Jefferson avenue,

five hundred (\$500) dollars; the Methodist Deaconess Home and Hospital, 2719 Chestnut street, St. Louis, five hundred (\$500) dollars; the Memorial Home, on Grand avenue, five hundred (\$500) dollars; the Bethesda Old Ladies Home, 917 Russell avenue, five hundred (\$500) dollars. All of the above institutions are located in the city of St. Louis, Mo. My life insurance I want to be paid to my wife, Abigail H. Hendgen; she can use the same as she sees fit. I bequeath all balance of my estate to my wife, Abigail H. Hendgen, to distribute as she sees fit after her death. I hereby appoint my friend, Marcus Sessel, of Bunker Hill, Macoupin county, Ill., and my wife, Abigail H. Hendgen, my executors of this will."

The decree construed the will as follows:

First—Abigail H. Bowerman (formerly Hendgen) takes the homestead described in said will during the term of her natural life, with power of disposition of the proceeds of the sale thereof after her death.

Second—That said Abigail H. Bowerman takes the life insurance in said will absolutely.

Third—That all the remainder of the estate of Peter J. Hendgen, deceased, is by said last will devised in trust to the executor, to be invested in and by the provisions of said will. All the interest and income derived therefrom is to be paid to the said Abigail H. Bowerman during her life, with power in her of disposition, by will or otherwise, of all of the property belonging to said estate except the bequests to the defendants herein and named in said will to take effect after her death; and if said interest or income amounts to less than \$50 per month, the principal of said estate not included in the bequests must contribute first to make this sum, and second, if found necessary, the bequests must contribute.

Fourth—The payment of all bequests is postponed until after the death of the said defendant, Abigail H. Bowerman, after which they are to be paid.

The testator died without leaving him surviving either child, children or descendants of a child or children. The estate consisted of notes, bonds and other securities, amounting in value to about \$20,000, and a house and lot, which was the homestead of the deceased, of the value of about \$800 to \$1000. The bequests to Philippine Burmester, John Louis Burmester and the various charitable institutions aggregate \$7500, and that all funds of the estate not necessary for the payment of such legacies should be paid to the widow of testator, the appellant.

The language of this bequest is as follows: "I bequeath all the balance of my estate to my wife, Abigail H. Hendgen, to distribute as she sees fit after her death." The argument deals with the bequest as standing by itself, and the insistence is, the gift to the appellant is absolute, and cannot be cut down or qualified by the concluding words, "to distribute as she sees fit after her death." The circuit court construed this bequest to invest the appellant, not with absolute title to the property to which it may apply, but with power to make disposition thereof by will or otherwise, to take effect after her death. This is the only view consistent with the general plan and purpose of the testator as disclosed by the whole will. The rule is, the whole will and all of its parts shall be construed together to determine the true meaning of the clause which contains this bequest to appellant. (2 Jarman on Wills,—5th Am. ed.—p. 494; 20 Am. & Eng. Ency. of Law, 959, note 1.) When all of the provisions of the will are considered together three principal purposes are disclosed: First, to provide a home for the wife and for her support and maintenance during her lifetime; second, to devote so much of the estate as should remain at the death of the wife to the payment of the legacies and bequests specified in the will; third, to empower the wife, during her lifetime, to direct, by will or other legal manner, for the disposition, after her death, of any balance of the assets of the estate

which might remain after the payment of such legacies and bequests. To accomplish the first of these purposes the testator declared by his will his wife should have the "homestead and household goods in it" during her natural life, and in addition should be entitled to receive from the executor at least \$50 per month during her natural life, and also any additional amount which she might stand in need of,—her necessities in this respect to be determined by the executor. In order to provide a fund wherewith to enable the executor to make such provisions for and payments to the wife, the testator directed that all of his property, real, personal or mixed, should be converted into an interest or income-producing fund, and that the monthly allowance provided for the wife should be paid out of such income or out of the *corpus* of the fund should the income thereof prove insufficient, this fund to remain, during the lifetime of the wife, intact in the hands of the executor, except so far as applied under the provisions for the support, maintenance and comfort of the wife. The provision with relation to the sale of the property of the testator to produce this fund is broad enough, considered as standing by itself, to include the "homestead and household goods" in the property to become converted into an income-producing fund, but, as before remarked, this clause of the will must be considered and given effect in connection with all other provisions or clauses, one of which expressly bequeaths to the wife the use and enjoyment of the "homestead and household goods" during her natural life, and another of which directs that the sale of the homestead and household goods shall be made after the death of the wife. After the death of the wife the proceeds of the sale of the "homestead and household goods" would fall into the general fund remaining in the hands of the executor which arose from the sale of the other property of the testator. The fund so remaining in the hands of the executor at the death of the wife, swollen by the proceeds

of the sale of the homestead and household goods, the will directs shall be devoted, so far as necessary, to the payment of the legacies specified in the will, and the balance to be appropriated to such persons or purposes as the wife of the testator shall have lawfully directed, by her will or in any other lawful manner, to receive it.

What has been said not only answers the contention referred to, but also the other insistence that the proceeds of the sale of the homestead and household goods will create a new fund which will have its inception after the other general fund has been distributed, and which is not devised or bequeathed to any one nor is any provision made for its disposition by the executor.

Nor are counsel correct in the position the will does not contemplate that the executor will, in any state of events after the death of the wife, hold any funds in his hands for any period of time longer than that required to pay or distribute it to the legatees mentioned in the will. The bequest to Phillipine Burmester cannot be paid at the death of the wife unless said Phillipine has then arrived at the age of eighteen years. Until that period occurs the executor must retain that portion of the fund in his hands. It may not occur for some time after the death of the appellant.

The chancellor correctly refused to regard the provisions of the will under consideration as void, and gave the proper construction to the instrument.

The decree is affirmed.

Decree affirmed.

INDEX.

ABATEMENT.	PAGE.
pendency of a suit for use of one person is not ground for abating another suit on same cause of action by same nominal plaintiff but for a different usee	155
if parties go to trial on plea in abatement and the defendant is defeated, nothing remains to be done but to ascertain the amount which plaintiff is entitled to recover...	155
if the defendant is in default on all issues except a plea in abatement, on which he is defeated, he can only participate to the extent of reducing the plaintiff's recovery..	156
ABSTRACT OF TITLE.	
abstract of title is admissible, in connection with testimony of attorney who examined it, to show that the purchaser relied on the record in good faith.....	175.
ACTIONS AND DEFENSES.—See RIGHTS AND REMEDIES.	
in tort it is proper for the court to enter judgment against one defendant and grant a new trial and permit dismissal against others, even though verdict was against all....	58
in action for damages for accidental death it is necessary to allege and prove that deceased left surviving a husband or wife or next of kin.....	94
omission of allegation in action for death that deceased left a surviving husband or wife or next of kin cannot be supplied by an amendment two years after the injury ...	94
elements necessary to authorize a recovery by servant for injury received from defective appliance.....	117
pendency of a suit for use of one person is not ground for abating another suit on the same cause of action by the same nominal plaintiff but for a different usee	155
insurance agent's knowledge of the falsity of answers by the insured to questions contained in his application will permit a recovery on the policy.. ..	167
in action for negligence, if reasonable minds would draw different conclusions from the evidence the court should not take the case from the jury.....	236
effect of failure of writ of attachment to state its grounds.	246

ACTIONS AND DEFENSES.— <i>Continued.</i>	PAGE.
assigned mortgage is subject to equitable defenses existing between the original parties but not to latent equities of third persons.....	249
what does not justify administrator's refusal to pay over funds to his successor	290
administrator's appointment cannot be questioned in a collateral proceeding	290
when rule that the State cannot be made defendant to suit has no application.....	410
when State court may properly decline to delay cause until termination of suit in Federal court.....	424
when information in the nature of <i>quo warranto</i> should not be deemed a private suit.....	493
duty of assessing capital stock and franchises of corporations is mandatory, and its performance may be enforced by <i>mandamus</i> when omitted or evaded	528
adjournment by board of equalization pending application for <i>mandamus</i> does not deprive the court of power to command it to re-convene and assess the omitted property..	529
where the duty sought to be enforced by <i>mandamus</i> is of a public nature, imposed by law, there is no necessity for a specific demand and refusal.....	529

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

section 70 of Administration act, providing that claims not presented in two years shall be barred, explained	356
fact that suit is pending against party at time of his death does not amount to an exhibition of the claim or demand against the estate.....	356
knowledge by executors that a suit was pending at time of testator's death does not take the case out of the operation of section 70 of Administration act.....	356
effect where claim against an estate is not of a character cognizable by the county court.....	356
when claim is not a contingent one.....	356
when decree allowing claim cannot be against inventoried assets.....	356

ADVANCEMENTS.

the fact that advancements were made, and the amounts thereof, must be established by extrinsic evidence, if the will leaves such matters uncertain.....	628
when declarations by testator concerning advancements to his son are inadmissible.....	628
when no presumption can arise that a son destroyed evidence of advancements by his father.....	628

AGENCY.—See PRINCIPAL AND AGENT.

AGREED FACTS.	PAGE.
that the evidentiary facts in a case are agreed upon does not excuse Appellate Court from reciting the ultimate facts in its judgment, as required by the Practice act...	75
facts need not be recited in Appellate Court's judgment if the ultimate facts have been agreed upon.....	75
a stipulation of facts in a suit by the husband of the testatrix against her minor heirs, to construe the will, is not binding on such heirs.....	100

AGREEMENTS.—See CONTRACTS.

ALIMONY.

one attached for contempt in not paying alimony must show that, acting in good faith, he has been unable to comply with the terms of the decree.....	416
unpaid alimony is not a debt which may be discharged by an order in bankruptcy proceedings.....	416

ALTERED INSTRUMENTS.

when alteration of note amounts to a forgery.....	136
subsequent alteration of complete note discharges maker.	136
when maker is liable upon raised note.....	136
note for ".....hundred dollars" is not a note for one hundred dollars, but is incomplete.....	136
mere negligence by the purchaser of a note does not deprive him of his character as a <i>bona fide</i> holder.....	136
effect of alteration of marginal figures of note.....	136

AMENDMENT.

omission of allegation in action for death that deceased left a surviving husband or wife or next of kin cannot be supplied by amendment two years after the injury.....	94
when defect in pleading is not cured by verdict.....	94

ANNEXATION.—See MUNICIPAL CORPORATIONS.

APPEALS AND ERRORS.

if a will disposes of a fee, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court, as a freehold is involved.	97
statement in instructions as to what was charged in dismissed counts is surplusage, and is not reversible error if instructions clearly state such counts were dismissed.	104
when instruction does not authorize recovery on dismissed count of the declaration.....	104

APPEALS AND ERRORS.— <i>Continued.</i>	PAGE.
if note is not preserved for inspection, Supreme Court can not say whether trial court erred in admitting it, without explanatory proof of alleged apparent alterations..	136
instructions which leave questions of implied knowledge and authority to the jury are erroneous.....	137
failure to enter a formal default as on partial defense is merely technical, and if an objection is not made in the trial court it cannot be raised on appeal.....	156
when instruction as to credibility of witness is proper....	199
an objection that grand jury was irregularly constituted is not preserved for review, on appeal, by motion to quash indictment because "it is wholly insufficient in law"....	272
one cannot avail of error in his own favor.....	272
appeal lies to Supreme Court if the State is interested, notwithstanding the provision of section 8 of the Appellate Court act as amended in 1887.....	326
the State is interested in suits relating to the Illinois and Michigan canal.....	326
rule as to amount involved in mechanic's lien appeal.....	372
when allowance of mechanic's lien will stand on appeal...	372
no appeal lies from order of a circuit judge refusing to dissolve injunction in vacation.....	389
act of June 14, 1887, allowing appeals from interlocutory orders, applies only to orders entered in term time.....	389
effect where Appellate Court reverses without remanding or reciting the facts in its judgment.....	439
amount involved, on appeal, is the amount to be disposed of by the judgment or decree, and not the amount affected by the error assigned.....	478
allegation of counsel that a constitutional question is involved does not confer jurisdiction on Supreme Court...	524
when construction of constitution is not involved.....	524
on affirming a judgment awarding <i>mandamus</i> , the Supreme Court need not fix date of return of writ....	529
alleged errors not urged in motion for new trial are waived.	594

ASSESSMENT COMPANIES.—See BENEFIT SOCIETIES.

ASSESSMENT FOR TAXATION.—See TAXES.

ASSIGNMENT.

word "claim" construed, as used in a deed of assignment..	181
assigned mortgage is subject to equitable defenses existing between the original parties, but not to latent equities of third persons.....	249
when assignee of mortgage is protected against payments made by purchasers of the property to the mortgagee, believing he still owned the mortgage.....	249

ASSIGNMENT.—Continued.

PAGE.

- section 49 of Chancery act does not prohibit assignment of trust fund created by third party..... 598
- in absence of restriction in will creating a trust fund the *cestui que trust* may assign the income, or part of it, to secure a debt owing by him..... 598

ASSUMED RISKS.—See MASTER AND SERVANT.**ATTACHMENT.**

- effect of failure of writ to state ground of attachment.... 246

BANKRUPTCY.

- unpaid alimony is not such a debt as may be discharged by an order in bankruptcy proceedings..... 416

BANKS.

- banker loaning money as agent for customer must use ordinary care common to bankers to guard against loaning to insolvent persons..... 382

BARGAIN AND SALE.—See SALES.**BASTARDS.—See ILLEGITIMATES.****BENEFIT SOCIETIES.**

- beneficiary has ordinarily no vested right to the mortuary fund, arising from the certificate..... 365
- when member's power of appointment by will is a vested right, which cannot be taken away 365
- it is only when a member expressly agrees to obey future amendments and by-laws that he is bound by such changes as impair the obligations of his contract..... 365
- what does not amount to an agreement by a member to be bound by future changes in laws..... 365
- admissibility of declarations by insured on question of mistake in making out benefit certificate 478
- competency of insured's declarations on question of mistake in benefit certificate does not depend upon whether beneficiary named was present when they were made ... 478
- right of interested parties to have a benefit certificate reformed by the court..... 479

BILLS AND NOTES.

- when alteration of note amounts to a forgery..... 136
- subsequent alteration of complete note discharges maker from liability..... 136
- note for "...hundred dollars" is not necessarily a note for one hundred dollars, but is incomplete..... 136

BILLS AND NOTES.—Continued.**PAGE.**

- when maker is liable upon raised note..... 136
- mere negligence on the part of purchaser of a note does not deprive him of the character of a *bona fide* holder.... 136
- effect of alteration of marginal figures of note..... 136
- if note is not preserved for inspection, Supreme Court can not say whether trial court erred in admitting it, without explanatory proof of alleged apparent alterations.. 133
- seller of orders issued to him for services does not impliedly warrant that they are issued by authority of law, nor that they are worth what they represent..... 186

BILLS OF DISCOVERY.

- a bill of discovery in aid of suit at law need not aver that the evidence is known only to the defendant 566
- a bill of discovery calling upon the defendant to convict himself by giving information to be used against him in a *qui tam* action cannot be maintained..... 566
- section 137 of Criminal Code, concerning bills of discovery, construed..... 566

BOARD OF EQUALIZATION.

- board of equalization acts as an original assessor of the capital stock and franchises of corporations..... 528
- duty of assessing capital stock and franchises of corporations is mandatory, and its performance may be enforced by *mandamus* when omitted or evaded..... 528
- when fraud by board of equalization in assessing capital stock and franchises of corporations is established..... 528
- rule for valuing capital stock and franchises..... 528
- board of equalization has power to assess omitted property, when acting as an original assessor, notwithstanding the modification of section 276 of Revenue act by act of 1898.. 528
- adjournment of board of equalization pending application for *mandamus* does not deprive court of power to command it to re-convene and assess omitted property..... 529

BOARD OF HEALTH.—See MEDICINE AND SURGERY.**BONDS.**

- executor's bondsmen are not liable for his defaults in his capacity as trustee or individually..... 497
- a mere charge by an executor against himself, as such, does not create a liability against his bondsmen..... 497

BREACH OF CONTRACT.

- to authorize termination for default, the default need not be such as would defeat the whole purpose of contract.. 319

BROKERS.

PAGE.

when real estate broker is entitled to commission..... 645

BURDEN OF PROOF.

in an action on life policy the defendant has the burden of proving the falsity of statements of the insured which it is claimed vitiate the policy..... 167

conveyance from husband to wife is presumed to be an advancement, and the burden is upon the grantor to prove the contrary..... 401

one attached for contempt in failing to pay alimony has the burden of proving that, acting in good faith, he has been unable to comply with the decree 416

the burden of proving insanity or undue influence upon the mind of a grantor, for the purpose of having his deed set aside, is upon the party making the allegations..... 450

in *quo warranto* the burden is upon the respondents to prove the legality of the acts complained of.... 493

CANALS.

the State is an interested party in suits relating to the Illinois and Michigan canal 328

the contract of December 21, 1899, between the canal commissioners and the sanitary district, is not capable of being specifically enforced..... 328

CARRIERS.—See RAILROADS.

railroad company operating its own line is liable to shippers for its own or its servants' negligence..... 57

when contract between carriers as allied lines of transportation does not create the relation of agency..... 57

carrier receiving freight to be carried beyond its own line is the agent of the owner to make delivery to the connecting carrier..... 57

carrier acting as an agent for another carrier in handling shipments is liable to third persons for acts of misfeasance on the part of its own employees. 58

when mistake in billing freight is an act of misfeasance.. 58

CASES CONTROLLED BY OTHERS.—See FORMER CASES.

Morse v. Pacific Railway Co (*ante*, p. 356,) controls the case of *Morse v. Pacific Railway Co*..... 371

CHANCERY.—See EQUITY.**CITIES.—See MUNICIPAL CORPORATIONS.****COLLATERAL ATTACK.**

administrator's appointment cannot be questioned in a collateral proceeding..... 290

COMMERCIAL PAPER.—See **BILLS AND NOTES.**

COMMISSIONS.

PAGE.

when real estate broker is entitled to commission..... 645

COMMON LAW MARRIAGE.—See **MARRIAGE.**

CONSTITUTIONAL LAW.

the act creating Branch Appellate Courts is constitutional. 272

CONSTRUCTION.

- of the Medicine and Surgery act of 1899, as being the only one on the subject at present in force..... 87
- of the Medicine and Surgery act of 1899, as not empowering the board of health to revoke certificates to practice medicine issued prior to July 1, 1899..... 87
- intention of testatrix must be gathered from the language used, in the light of attending circumstances, and not from the testimony of a subscribing witness..... 100
- construction which would render will inoperative should be avoided, if possible..... 100
- of clause of will devising property to husband of testatrix, "to have and to hold unto 'my' or our son's, his heirs and assigns forever"..... 100
- of instruction, as not authorizing a recovery on dismissed counts of the declaration 104
- of word "claim," as used in a deed assigning claims and in a bond, as to their value..... 181
- of provision of a will, as creating a trust which is not defeated by the fact the trustee is one of the beneficiaries. 193
- statute should be construed so as to give effect to the main intent, even though some particular provisions are not construed literally 257
- in construing a statute the court will have regard to existing circumstances or contemporaneous conditions..... 257
- of section 18 of Annexation act, preserving dram-shop ordinances of the annexed territory, as preserving in force all ordinances entitled "Dram-shops" 257
- of language of will, as to when persons designated as "heirs-at-law" do not take *per stirpes*..... 296
- section 88 of Practice act, giving right of appeal to the Supreme Court if State is interested, was not repealed by section 8 of Appellate Court act as amended in 1887..... 326
- of section 70 of Administration act, requiring claims to be exhibited within two years, as being merely a limitation upon right to participate in inventoried assets..... 356
- of act of June 14, 1887, allowing appeals from interlocutory orders, as applying only to orders entered in term time.. 389

CONSTRUCTION.—*Continued.*

PAGE.

- of act of 1899, imposing two per cent tax on "gross amount of premiums received" by foreign insurance companies, as not applying to premiums refunded on canceled policies. 410
- of sections 2 and 3 of the Statute of Descent, as applying to all illegitimate children..... 424
- of section 2 of Riot act of 1887, as making county liable for subsistence of deputies while on duty, whether they provide subsistence at their own homes or elsewhere..... 484
- of section 276 of old Revenue law as modified by the Revenue act of 1898, as not depriving State Board of Equalization of power to assess omitted property when acting as original assessor..... 528
- of section 137 of the Criminal Code, concerning bills of discovery, as to its application 566
- rule where will is susceptible of two constructions ... 574
- when limitation over is void for remoteness..... 574
- of devise, as passing a base or determinable fee..... 574
- of section 49 of Chancery act, as not prohibiting assignment of trust fund created by third party..... 598
- whole will should be considered in determining the meaning of words used in a particular clause..... 651
- language of will construed..... 651

CONTEMPT.

- one attached for contempt in not paying alimony must prove that, acting in good faith, he has been unable to comply with the terms of the decree..... 416

CONTRACTS.

- when a contract between carriers as allied lines of transportation does not create the relation of agency..... 57
- whether written contract creates relation of agency is a question of law..... 58
- purchaser of mortgaged property is not personally liable unless there is a contract, express or implied, to pay the mortgage debt or some part thereof..... 107
- a promise to pay a mortgage debt is implied if amount of encumbrance is included in the purchase price and the purchaser retains that much of the purchase money.... 107
- an implied promise to pay a mortgage debt cannot exist where there is an express understanding to the contrary and a distinct refusal by the purchaser to pay it.... 107
- a verbal promise to pay an existing mortgage debt as part of the consideration is valid, and may be enforced by the grantor or the holder of the mortgage..... 161
- grantee who, as part of the consideration, has assumed the mortgage debt, cannot dispute the consideration for the mortgage..... 161

CONTRACTS.—*Continued.*

PAGE.

an indebtedness to be secured is essential to the existence of a mortgage, or there must be some obligation to pay money or perform some act or duty.....	205
what evidence tends to show that quit-claim deed was not intended as in the nature of a mortgage.....	205
to authorize termination, default need not be such as to defeat the whole purpose of the contract.....	319
right to specific performance of contract is not absolute, as is the right to recover damages at law.....	326
a contract must be fair, equal and just to entitle party to have it specifically enforced	326
specific performance will not be decreed if there is an adequate legal remedy.....	326
contract of December 21, 1899, between the canal commissioners and the sanitary district, is not capable of being specifically enforced.....	326
it is only when member of benefit society expressly agrees to obey future changes in the laws that he is bound by changes impairing the obligations of his contract.....	365
what does not amount to an agreement by a member to be bound by future changes in the laws.....	365
in absence of agreement for an eight-hour day no recovery can be had for overtime.....	484
terms of a reward must be substantially complied with by the claimant.....	610
what not a compliance with terms of reward... ..	610
services must be rendered in view of the reward.....	610
an agreement to convey right of way to railroad company may be specifically enforced in a proper case.....	633
what does not justify a refusal to perform contract to convey right of way	633
railroad company acquires same privileges under right of way contract as by condemnation.....	633
when real estate broker is entitled to commission.....	645

CONTRIBUTION.

to entitle one to contribution for redemption the equities of the parties must be equal.	305
when judgment creditor is not entitled to contribution for making redemption	305

CONVEYANCES.—See DEEDS; MORTGAGES.

a conveyance is binding upon the grantor although it was made for purpose of defrauding creditors.....	401
conveyance from husband to wife is presumed to be an advancement, and the burden is upon the grantor to prove the contrary	401

CONVEYANCES.—*Continued.*

PAGE.

- facts under which it is proper to require parties claiming under deed to prove fairness of the transaction..... 401
 what evidence is sufficient to overcome notary's certificate of acknowledgment..... 401

CORPORATIONS.—See MUNICIPAL CORPORATIONS; RAILROADS.

- when former stockholder is not liable to creditors of corporation for unpaid balance on stock subscription..... 128
 surrender of stock to company is in effect a purchase by it. 128
 decree finding parties to be stockholders in corporation is not *res judicata* as to their status as stockholders, in a subsequent suit by different complainant..... 128
 beneficiary named in benefit certificate has ordinarily no vested right to the mortuary fund..... 365
 when power of appointment by will, possessed by member of benefit society, is a vested right..... 365
 it is only when member of benefit society expressly agrees to obey future changes in the laws that he is bound by changes impairing the obligations of his contract..... 365
 what does not amount to an agreement by a member to be bound by future changes in the laws..... 365
 the two per cent tax imposed by act of 1899 on the "gross amount of premiums received" by foreign insurance companies does not apply to premiums refunded. 410
 the board of equalization acts as an original assessor of the capital stock and franchises of corporations 528
 duty of assessing capital stock and franchises of corporations is mandatory, and its performance may be enforced by *mandamus* when omitted or evaded 528
 when fraud by board of equalization in assessing capital stock and franchises of corporations is established..... 528
 rule for valuing capital stock and franchises of corporations for purposes of taxation..... 528

COSTS.

- to sustain allowance of solicitors' fees as costs in partition the evidence must be preserved in the record, either by recitals in the decree or by certificate of evidence..... 461
 under the statute concerning apportioning of complainant's solicitor's fee in partition, the good and substantial defense referred to need not necessarily be successful .. 461

COUNTIES.

- under section 2 of the Mobs and Riots act of 1887 county is liable for subsistence of deputies while on duty, whether they provide subsistence at their own homes or elsewhere. 484

COUNTIES.—Continued.	PAGE.
eight-hour day law does not apply to services of an official character, such as those of deputy sheriffs appointed to preserve the peace in case of riot.....	484
COURTS.—See APPEALS AND ERRORS; JURISDICTION.	
that the evidentiary facts in a case are agreed upon does not excuse the Appellate Court from finding the ultimate facts in its judgment in cases required by Practice act .	75
the facts need not be recited in Appellate Court's final judgment if the ultimate facts have been agreed upon.....	75
if will dispose of a fee, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court, as a freehold is involved.....	97
act creating Branch Appellate Courts is constitutional...	272
section 88 of Practice act, giving a right of appeal to the Supreme Court if State is interested, was not repealed by section 8 of Appellate Court act as amended in 1887..	326
when State court may properly decline to delay cause until termination of another suit in Federal court	424
CREDITORS.—See DEBTOR AND CREDITOR.	
CREDITORS' BILLS.	
when trust fund cannot be reached by creditor's bill	598
when priority in filing cross-bill does not secure preference.	598
CRIMINAL LAW.	
objection that grand jury was irregularly constituted is not preserved for review, on appeal, by motion to quash indictment because "it is wholly insufficient in law".....	272
accused cannot complain, on appeal, that judgment merely commits him to county jail till his fine is satisfied at rate provided instead of requiring him to work out such fine..	272
false representation by partner as to firm's financial standing is within section 97 of the Criminal Code	272
party may be imprisoned to satisfy fine after serving the term fixed for punishment.....	272
a bill of discovery calling upon the defendant to convict himself by giving information to be used against him in <i>qui tam</i> action under penal statute cannot be maintained.	566
section 137 of Criminal Code, concerning bills of discovery, construed.....	566
CROSS-BILL.	
guardian <i>ad litem</i> of insane defendant in separate maintenance may maintain a cross-bill to annul the marriage on ground of his ward's mental incapacity.....	230

CROSS-BILL.—*Continued.*

PAGE.

- it is competent for the court, in separate maintenance, to entertain a cross-bill to annul the marriage..... 280
- when cross-bill is unnecessary, in foreclosure, to enable the court to determine the priority of liens and order distribution of proceeds..... 553

CROSS-EXAMINATION.—See TRIAL.**DEBTOR AND CREDITOR.**

- redemption by judgment creditor passes title to the judgment debtor's property only, even though the mortgage covers other lots belonging to other parties..... 305
- when judgment creditor is not entitled to contribution for making redemption..... 305
- in absence of restriction in a will creating trust fund, the *cestui que trust* may assign the income, or part of it, to secure a debt owing by him 598
- when trust fund cannot be reached by creditor's bill..... 598
- when priority in filing cross-bill does not secure preference. 598

DECREES.—See JUDGMENTS AND DECREES.**DEEDS.**

- facts under which bill to cancel deed is properly dismissed. 79
- what evidence tends to show that a quit-claim deed was not intended as in the nature of a mortgage..... 205
- applications to cancel deeds are subject to the maxim he who seeks equity must do equity.... 215
- when deed should not be canceled without requiring complainant to refund consideration..... 215
- conveyance is binding upon the grantor although made for the purpose of defrauding creditors..... 401
- conveyance from husband to wife is presumed to be an advancement, and the burden is upon the grantor to prove the contrary..... 401
- facts under which it is proper to require parties claiming under deed to show fairness of transaction..... 401
- what will overcome notary's certificate of acknowledgment. 401
- the burden of proving insanity or undue influence upon the mind of a grantor, for the purpose of having his deed set aside, is upon the party making the allegations..... 450

DEMAND.

- where the duty sought to be enforced by *mandamus* is of a public nature, imposed by law, there is no necessity for a specific demand and refusal..... 529

DEPOSITIONS.

- proper method of objecting to testimony in deposition.... 58

DEPUTY SHERIFFS.—See SHERIFFS.

DESCENT.

PAGE.

when fee in trust property descends as intestate estate... 193

DISCOVERY.—See BILLS OF DISCOVERY.

DISTRACTED PERSONS.—See INSANE PERSONS.

DIVORCE.

it is competent for the court in a separate maintenance proceeding to entertain a cross-bill to annul the marriage.. 280
 when marriage is void *ab initio*..... 280
 one attached for contempt in failing to pay alimony has the burden of proving that, acting in good faith, he has been unable to comply with the decree..... 416
 unpaid alimony is not such a debt as may be discharged by an order in bankruptcy proceedings..... 416

DRAINAGE.

the contract of December 21, 1899, between the canal commissioners and the sanitary district, is not capable of being specifically enforced..... 326
 party voluntarily connecting with drainage ditch subjects only his own land to being taken into the district..... 623

DRAM-SHOPS.

section 18 of Annexation act, preserving dram-shop ordinances of annexed territory, construed as preserving all ordinances entitled "Dram-shops"..... 257
 section 18 of Annexation act preserves in full force all of the Hyde Park liquor ordinances in force at the time the village of Hyde Park was annexed to Chicago..... 257

ELEVATORS.

when owner of building is not liable for death of a servant caused by falling down open elevator shaft..... 226
 master's liability concerning elevator shaft is entirely different from that concerning a mine shaft..... 226

EQUITY.

facts under which bill to cancel deed is properly dismissed. 79
 equity has no jurisdiction to enjoin collection of tax upon grounds which might properly have been made the basis of a proceeding at law by *mandamus*..... 84
 applications to cancel deeds are subject to the maxim he who seeks equity must do equity..... 215
 when deed should not be canceled without requiring complainant to refund consideration... .. 215
 right to specific performance of a contract is not absolute, as is the right to recover damages at law..... 328

EQUITY.—Continued.

PAGE.

contract must be fair, equal and just to warrant its specific enforcement by a court of equity.....	326
specific performance will not be decreed if there is an adequate remedy at law.....	326
when the collection of tax will not be enjoined because of clerical error in name of the corporation taxed.....	351
a court of equity may control manner of performing public work while it is in progress, in order to prevent any substantial departure from the terms of the ordinance.....	374
honest fulfillment of public contract may be enforced, but it must be by a direct proceeding.....	375
equity will not compound interest on a trust fund except in cases of gross delinquency	391
equity may take jurisdiction to avoid multiplicity of suits.	410
when cross-bill is unnecessary, in foreclosure, to enable the court to determine priority of liens and order distribution of proceeds.....	553
failure of foreclosure decree to specify time for payment of amount due is not reversible error.. ..	553
bill of discovery in aid of a suit at law need not allege that the evidence desired is known only to the defendant ...	566
a bill of discovery calling upon the defendant to convict himself by giving information to be used against him in <i>qui tam</i> action under penal statute cannot be maintained.	566
section 137 of Criminal Code, concerning bills of discovery, construed.....	566
when trust fund cannot be reached by creditor's bill ...	598
when priority in filing cross-bill does not secure preference.	598
agreement to convey right of way to a railroad company may be specifically enforced in a proper case.....	633
what does not justify refusal to perform contract to convey right of way.....	633

ERROR.—See APPEALS AND ERRORS.**ESTOPPEL.**

grantee who, as part of the consideration, has assumed the mortgage debt, cannot dispute the consideration for the mortgage.....	161
party cannot avail of error in his own favor.....	272

EVIDENCE.

proper method of objecting to testimony in deposition...	58
facts under which bill to cancel deed is properly dismissed.	79
in an action on life policy the defendant has the burden of proving the falsity of statements of the insured which it is claimed vitiate the policy.....	167

EVIDENCE.—*Continued.*

PAGE.

what not a circumstance to excite inquiry as to the validity of a record release of trust deed.....	175
when abstract of title is admissible.	175
what evidence tends to show that a quit-claim deed was not intended as in the nature of a mortgage.....	205
what evidence tends to establish case against street railway company for backing car against a wagon in which plaintiff was crossing track	241
facts under which owner of building is not liable for a servant's death caused by falling down open elevator shaft.	226
what facts immaterial to servant's right of recovery.....	236
when photograph is properly denied admission.....	340
when evidence of insufficient light for work is admissible on question of due care by plaintiff	340
conveyance from husband to wife is presumed to be an advancement, and the burden is on the grantor to prove the contrary.....	401
facts under which it is proper to require parties claiming under deed to prove fairness of transaction.....	401
what sufficient to overcome notary's certificate.....	401
one attached for contempt in failing to pay alimony has the burden of proving that, acting in good faith, he has been unable to comply with the decree	416
when presumption that the husband is the father of wife's children cannot prevail.....	424
what facts show a valid common law marriage.....	424
an originally meretricious relation may be shown to have become matrimonial.....	424
the burden of proving insanity or undue influence upon the mind of a grantor, for the purpose of having his deed set aside, is upon the party making the allegations.....	450
when defendant in a partition suit by heirs against their ancestor's wife may testify under the third exception to section 2 of the Evidence act	450
right of defendant to cross-examine complainant's witness to show ill-will or hostile feeling.....	450
admissibility of declarations by insured on question of mistake in making out benefit certificate.....	478
competency of insured's declarations on question of mistake in benefit certificate does not depend upon whether beneficiary named was present when they were made....	478
what tends to show wantonness in management of train...	489
in <i>quo warranto</i> the burden is upon the respondents to prove the legality of the acts complained of.....	493
when a fraud by board of equalization in assessing capital stock and franchises of corporations is established.....	528

EVIDENCE.—Continued.**PAGE.**

- the fact that advancements were made, and the amounts thereof, must be established by extrinsic evidence, if the will leaves those matters uncertain..... 628
- when declarations by testator concerning advancements to his son are inadmissible 628
- when no presumption can arise that a son destroyed evidence of advancements by his father..... 628

EXECUTORS AND ADMINISTRATORS.—See ADMINISTRATION.

- what does not justify administrator's refusal to pay over funds to his successor..... 290
- administrator's appointment cannot be attacked in a collateral proceeding 290
- when executors of trustee are chargeable with interest for withholding trust fund. 391
- executor's bondsmen are not liable for his defaults in the capacity of trustee or individually..... 497
- when proceeds of insurance certificate are received by executor, under the will, as trustee..... 497
- mere charge by an executor against himself, as such, does not create a liability against his bondsmen..... 497

FALSE REPRESENTATION.

- false representation by partner as to firm's financial standing is within section 97 of Criminal Code..... 272

FARM DRAINAGE.

- party voluntarily connecting with drainage ditch subjects only his own land to being taken into the district..... 623

FEES AND SALARIES.

- the legal right to an office carries with it the right to the salary or emoluments of the office..... 516

FELLOW-SERVANTS.

- rule where foreman is temporarily acting as a co-laborer with servant at time of latter's injury..... 236

FINES.

- accused cannot complain, on appeal, that judgment merely commits him to county jail until his fine is satisfied at the rate provided, instead of requiring him to work it out. 272
- judgment of conviction may provide that accused be imprisoned to satisfy fine after serving the term fixed for punishment..... 272

FOREIGN CORPORATIONS.

PAGE.

the two per cent tax imposed by the act of 1899 on "gross amount of premiums received" by foreign insurance companies does not apply to premiums refunded..... 410

FORGERY.

when alteration of note amounts to a forgery 136
 subsequent alteration of complete note discharges maker from liability..... 136
 when maker is liable upon raised note..... 136
 note for "....hundred dollars" is not a note for one hundred dollars, but is incomplete..... 136
 effect, of alteration of marginal figures of note..... 136

FORMER CASES.

Yocum v. Smith, 63 Ill. 321, distinguished, as to when note is not complete so as to excuse maker from liability upon its alteration..... 136

FRATERNAL INSURANCE.—See BENEFIT SOCIETIES.

FRAUD.

conveyance is binding upon the grantor though made for the purpose of defrauding creditors 401
 an assessment of property for taxation may be impeached where it has fraudulently been made too low..... 528
 where fraud by board of equalization in assessing capital stock and franchises of corporations is established..... 528

FREEHOLD.

if a will disposes of a fee, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court, as a freehold is involved. 97

GRAND JURY.

an objection that grand jury was irregularly constituted is not preserved for review, on appeal, by motion to quash indictment because "it is wholly insufficient in law"..... 272

GRANTOR AND GRANTEE.—See DEEDS.

HUSBAND AND WIFE.

when marriage is void *ab initio*..... 280
 it is competent for the court, in separate maintenance, to entertain a cross-bill to annul the marriage..... 280
 a conveyance from husband to wife is presumed to be an advancement, and the burden is on the grantor to prove the contrary..... 401

HUSBAND AND WIFE.—Continued.

PAGE.

- a conveyance from husband to wife is binding on grantor though made for purpose of defrauding creditors.. . . . 401
- unpaid alimony is not such a debt as may be discharged by an order in bankruptcy proceedings 416
- when presumption that the husband is the father of wife's children cannot prevail 424
- an originally meretricious relation may be shown to have become matrimonial 424
- what evidence shows a valid common law marriage 424

ILLEGITIMATES.

- when the presumption that husband is the father of wife's children cannot prevail 424
- sections 2 and 3 of the Statute of Descent, respecting illegitimate children, applies to all illegitimate children... 424
- when valid common law marriage is established 424

IMPLIED PROMISES.—See CONTRACTS.**IMPROVEMENTS.—See PUBLIC IMPROVEMENTS.****INFANTS.—See MINORS.****INJUNCTION.**

- equity has no jurisdiction to enjoin collection of tax upon grounds which might properly have been made the basis of a proceeding at law by *mandamus*. 84
- when collection of a tax will not be enjoined because of a clerical error in name of the corporation taxed 351

INSANE PERSONS.

- guardian *ad litem* of insane defendant in separate maintenance may maintain a cross-bill to annul the marriage for mental incapacity of his ward 280
- when court has jurisdiction to determine issue as to sanity of defendant to separate maintenance suit 280
- marriage of insane person is void *ab initio*. 280

INSTRUCTIONS.

- statement in instructions as to what was charged in dismissed counts is surplusage, and is not reversible error if instructions clearly state such counts were dismissed.. 104
- when instruction does not authorize recovery on dismissed counts of the declaration 104
- instructions should be clear and be applicable to evidence. 117
- instructions which leave the questions of implied knowledge and authority to the jury are erroneous 137

INSTRUCTIONS.—Continued.		PAGE.
when instruction upon the subject of the credibility of a witness is not improper.....		199
peremptory instruction asked as one of the series submitting the case to the jury comes too late.....		241
INSURANCE.		
in an action on life policy the defendant has the burden of proving the falsity of statements of the insured which it is claimed vitiate the policy.....		167
agent's knowledge of the falsity of answers by the insured to questions contained in his application will permit a recovery on the policy.....		167
the two per cent tax imposed by act of 1899 on the "gross amount of premiums received" by foreign companies does not apply to premiums refunded.....		410
INTEREST.		
when trustee is not chargeable with interest.....		391
when mingling of trust funds with trustee's private funds does not create liability for interest.....		391
when executors of a trustee are chargeable with interest for withholding the trust fund.....		391
equity will not compound interest on a trust fund except in cases of gross delinquency.....		391
INTOXICATING LIQUORS.		
section 18 of Annexation act, preserving dram-shop ordinances of annexed territory, construed as preserving all ordinances entitled "Dram-shops.".....		257
section 18 of Annexation act preserves in full force all of the Hyde Park liquor ordinances in force at the time the village of Hyde Park was annexed to Chicago.....		257
JUDGMENTS AND DECREES.		
decree finding parties to be stockholders in a corporation is not <i>res judicata</i> as to their status as stockholders, in a subsequent suit by a different complainant.....		128
a judgment of conviction may provide that accused be imprisoned to satisfy fine after serving the term fixed for punishment.....		272
accused cannot complain, on appeal, that judgment merely commits him to county jail until his fine is satisfied at rate provided, instead of requiring him to work it out...		272
when decree allowing a claim against an estate cannot be against inventoried assets.....		356
failure of foreclosure decree to specify time for payment of amount due is not reversible error.....		553

JUDICIAL SALES.—See SALES.

.PAGE.

purchaser at judicial sale is chargeable with notice of such material facts as are disclosed by the record 305

JURISDICTION.

equity has no jurisdiction to enjoin collection of tax upon grounds which might properly have been made the basis of a proceeding at law by *mandamus*..... 84

if will disposes of a fee, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court, as a freehold is involved..... 97

ground of equity jurisdiction to cancel deed..... 215

when court has jurisdiction to determine issue as to sanity of defendant to separate maintenance suit..... 280

in separate maintenance, court may entertain cross-bill to annul the marriage 280

appeal lies to Supreme Court if State is interested, notwithstanding the provisions of section 8 of the Appellate Court act as amended in 1887..... 326

rule as to amount involved in mechanic's lien appeal..... 372

equity may take jurisdiction to avoid multiplicity of suits. 410

when State court may properly decline to delay the cause until termination of suit in Federal court..... 424

amount involved on appeal is the amount to be disposed of by the judgment or decree, and not the amount affected by the error assigned,..... 478

allegation of counsel that a constitutional question is involved does not confer jurisdiction on Supreme Court... 524

when construction of constitution is not involved..... 524

JURY.—See LAW AND FACT.

what a proper examination of jurors upon their *voir dire* .. 340

LABOR.—See WORK AND LABOR.

LAW AND FACT.

whether a written contract creates the relation of principal and agent between the parties is a question of law.. 58

that the evidentiary facts in a case are agreed upon does not excuse the Appellate Court from reciting the ultimate facts in its judgment, as required by Practice act. 75

facts need not be recited in Appellate Court's judgment if the ultimate facts have been agreed upon..... 75

implied knowledge and implied authority are questions of law, and instructions which leave them to be determined by the jury are erroneous 137

whether servant assumed risk becomes a question of law if all reasonable minds would draw the same conclusion from the evidence..... 226

LAW AND FACT.—*Continued.*

PAGE.

- in actions for negligence, if reasonable minds might draw different conclusions from the evidence the court should not take the case from the jury..... 236
- whether danger was so imminent that an ordinarily prudent man would not have incurred it is a question of fact for the jury..... 236
- whether master was negligent in not furnishing sufficient help is ordinarily a question of fact for the jury..... 439

LICENSE.—See DRAM-SHOPS.

LIENS.—See MECHANICS' LIENS; MORTGAGES.

LIMITATIONS.

- omission of allegation, in action for death, that deceased left a surviving husband or wife or next of kin, cannot be supplied by amendment two years after the injury.... 94
- section 70 of the Administration act, requiring claims to be exhibited within two years, as being merely a limitation upon right to participate in inventoried assets..... 356

LODGES.—See BENEFIT SOCIETIES.

LUNATICS.—See INSANE PERSONS.

MANDAMUS.

- duty of board of equalization to assess capital stock and franchises of corporations may be enforced by *mandamus* when omitted or evaded..... 528
- adjournment of board of equalization pending application for *mandamus* does not deprive court of power to command it to re-convene and assess omitted property..... 529
- where the duty sought to be enforced by *mandamus* is of a public nature, imposed by law, there is no necessity for a specific demand and refusal..... 529
- on affirming judgment awarding *mandamus*, Supreme Court need not fix date of return of writ..... 529

MARRIAGE.

- it is competent for the court, in a separate maintenance proceeding, to entertain a cross-bill to annul marriage.. 280
- when marriage is void *ab initio*..... 280
- when presumption that the husband is the father of wife's children does not prevail..... 424
- statute respecting illegitimates applies to all illegitimate children, even to those born of parents living in a state of adultery..... 424

MARRIAGE.—Continued.

PAGE.

an originally meretricious relation may be shown to have become matrimonial.....	424
what evidence sufficient to show common law marriage...	424

MASTER AND SERVANT.

duty of using reasonable care to keep machinery and appliances in order is the duty of "inspection," which rests upon the master and not the servant.	117
although not required to "inspect" appliances, servant is bound to take notice of open defects.....	117
elements necessary to authorize recovery by a servant for injury received from defective appliance.....	117
servant assumes the risk of obvious dangers.....	226
when owner of building is not liable for death of servant caused by falling down open elevator shaft.....	226
whether servant assumed risk becomes a question of law if all reasonable minds would draw the same conclusion from the evidence.....	226
master's liability concerning elevator shaft is entirely different from that concerning a mine shaft.....	226
servant is not bound to disobey foreman unless the danger is so imminent that a man of ordinary prudence would not incur it.....	236
whether danger is so imminent that an ordinarily prudent man would not incur it is a question of fact for the jury.	236
what facts immaterial to servant's right of recovery.....	236
rule where foreman is temporarily acting as a co-laborer with servant at time of latter's injury.....	236
what matters need not be alleged in declaration in action for negligence in not furnishing sufficient help.....	439
master must exercise reasonable care to furnish an adequate number of co-laborers to assist servant in performing work of a hazardous nature.....	439
servant may obey master's order to work temporarily outside the scope of his employment without thereby necessarily assuming the risk incident to the work.....	439
whether master was negligent in not furnishing sufficient help is ordinarily a question of fact for the jury.....	439

MECHANICS' LIENS.

rule as to amount involved in mechanic's lien appeal.....	372
when allowance of mechanic's lien will stand, on appeal...	372

MEDICINE AND SURGERY.

State Board of Health has no power to discipline holders of certificates to practice medicine, issued prior to July 1, 1899, nor to revoke such certificates.....	87
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

MEDICINE AND SURGERY.—Continued.	PAGE.
act of 1899, regulating the practice of medicine and surgery, is the only one at present in force.....	87
provisions of sections 2 and 6 of the Medicine and Surgery act of 1899 construed.....	87
MINORS.	
a stipulation of facts in a suit by the husband of the testatrix against her minor heirs to construe the will is not binding on such heirs.....	100
MISTAKE.	
admissibility of declarations by insured on the question of mistake in making out benefit certificate.....	478
competency of insured's declarations on question of mistake in benefit certificate does not depend upon whether beneficiary named was present when they were made....	478
right of interested parties to have a benefit certificate reformed by the court.....	479
MOBS AND RIOTS.	
sending by Governor of troops into a county in case of riot does not suspend power of sheriff to appoint deputies to aid in preserving the peace.....	484
under section 2 of the Mobs and Riots act of 1887, county is liable for subsistence of deputies while on duty, whether they provide subsistence at their own homes or elsewhere.	484
eight-hour day law does not apply to services of an official character, such as those of deputy sheriffs appointed to preserve the peace in case of riot.....	484
MORTGAGES.	
purchaser of mortgaged property is not personally liable unless there is a contract, express or implied, to pay the mortgage debt or some part thereof.....	107
promise to pay mortgage debt is implied if amount of encumbrance is included in the consideration and the purchaser retains that much of the purchase price.....	107
to create personal liability the encumbrance must be expressly assumed or the amount allowed in the purchase price, so that the law will imply a promise	107
an implied promise to pay a mortgage debt cannot exist where there is an express understanding to the contrary and a distinct refusal by the purchaser to pay it.....	107
a verbal promise to pay an existing mortgage debt as part of the consideration is valid, and may be enforced by the grantor or the holder of the mortgage.....	161

MORTGAGES.—*Continued.*

PAGE.

grantee who, as part of the consideration, has assumed the mortgage debt, cannot dispute the consideration for the mortgage.....	161
release of trust deed by trustee without authority or payment does not discharge lien as between original parties nor as to subsequent purchasers with notice.....	174
purchaser may rely upon public records in security, unless he is chargeable with notice of some title, claim or conveyance inconsistent therewith.....	174
in absence of notice or ground of suspicion, a purchaser of property need not inquire whether note secured by trust deed released of record has been paid.....	174
what not a circumstance to excite inquiry as to validity of release of trust deed.....	175
an indebtedness to be secured is essential to the existence of a mortgage, or there must be some obligation to pay money or perform some act or duty..	205
what evidence tends to show that a quit-claim deed was not intended as in the nature of a mortgage.....	205
assigned mortgage is subject to equitable defenses existing between the original parties, but not to latent equities of third persons.....	249
when assignee of mortgage is protected against payments made by purchasers of the property to the mortgagee believing he still owned the mortgage.....	249
redemption by judgment creditor passes title to judgment debtor's property only, even though the mortgage covers other property owned by other parties.....	305
to entitle one to contribution for redemption the equities of the parties must be equal.....	305
when judgment creditor is not entitled to contribution for making redemption.....	305
purchaser at foreclosure sale is chargeable with notice of such material facts as are disclosed by the record.....	305
when record of mortgage is sufficiently certain to be constructive notice of amount secured.....	553
failure of foreclosure decree to specify time for payment of amount found due is not reversible error.....	553
when cross-bill is unnecessary, in foreclosure, to enable the court to determine priority of liens and order distribution of proceeds.....	553

MOTIONS.

objection that grand jury was irregularly constituted is not preserved for review, on appeal, by motion to quash indictment because "it is wholly insufficient in law".....	272
alleged errors not urged in motion for new trial are waived.	594

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

city cannot arbitrarily provide for putting in house connection slants, regardless of lot frontage.....	210
section 18 of Annexation act, preserving dram-shop ordinances of annexed territory, construed as preserving all ordinances entitled "Dram-shops".....	257
section 18 of Annexation act preserves in full force all of the Hyde Park liquor ordinances in force at the time the village of Hyde Park was annexed to Chicago.....	257
acts of chief of police based upon proceedings of the council giving supposed authority, are binding upon city.....	516
when municipal officer illegally dismissed under the Civil Service act may compel city to pay his back salary.....	516
salary follows the legal title to the office.....	516

MUTUAL INSURANCE.—See BENEFIT SOCIETIES.

NEGLIGENCE.

railroad company operating its own line is liable to shippers for its own or its servants' negligence.....	57
carrier acting as the agent for another carrier in handling freight is liable to third persons for acts of misfeasance on the part of its own employees.....	58
when mistake in billing is an act of misfeasance.....	58
in action for damages for accidental death it is necessary to allege and prove that deceased left surviving a husband or wife or next of kin.	94
omission of allegation in an action for death that deceased left a surviving husband or wife or next of kin cannot be supplied by amendment two years after the injury.....	94
duty of using reasonable care to keep machinery and appliances in order is the duty of "inspection," which rests upon the master and not the servant.....	117
although not required to "inspect" appliances, servant is bound to take notice of open defects.....	117
elements necessary to authorize a recovery by servant for injury received from defective appliance.....	117
mere negligence does not deprive the purchaser of a note of his character as a <i>bona fide</i> holder.....	137
servant assumes the risk of obvious dangers.....	226
when owner of a building is not liable for death of servant caused by falling down open elevator shaft.....	226
whether servant assumed risk becomes a question of law if all reasonable minds would draw the same conclusion from the evidence.....	226
master's liability concerning elevator shaft is entirely different from that concerning a mine shaft....	226
what facts immaterial to servant's right of recovery.....	236

NEGLIGENCE.—*Continued.*

PAGE.

servant is not bound to disobey foreman unless the danger is so imminent that an ordinarily prudent man would not incur it.....	236
rule where a foreman is temporarily acting as co-laborer with servant at time of latter's injury.....	236
what evidence tends to establish case against street railway company for backing car against a wagon in which plaintiff was crossing tracks.....	241
when evidence of insufficient light for work is admissible upon question of due care by plaintiff.....	340
banker loaning money as agent for customer must use ordinary care common to bankers to guard against loaning to insolvent persons.....	382
what matters need not be alleged in declaration in action for negligence in not furnishing sufficient help.....	439
master must use reasonable care to furnish sufficient number of co-laborers to assist servant in performing work of a hazardous nature.....	439
servant may obey master's order to work temporarily outside the scope of his employment without thereby necessarily assuming the risk incident to the work.....	439
whether master was negligent in not furnishing sufficient help is ordinarily a question of fact for the jury.....	439
what tends to show wantonness in management of train...	489
teamster having break-down on railroad crossing has right to try to save his property if the circumstances justify a reasonable belief that he can do so with safety.....	489

NEGOTIABLE INSTRUMENTS.—See BILLS AND NOTES.

NOTARIES.

what evidence sufficient to overcome notary's certificate of acknowledgment to voluntary conveyance.....	401
----------------------------------------------------------------------------------------------------------	-----

NOTICE.

purchaser may rely upon public records in security, unless he is chargeable with notice of some claim, title or conveyance inconsistent therewith.....	174
in absence of notice or ground of suspicion, purchaser of property need not inquire whether note secured by trust deed released of record has been paid.....	174
what not a circumstance to excite inquiry as to validity of release of trust deed.....	175
tax-payer is entitled to notice of change in assessment if assessor accepts his schedule and valuation as correct..	202
assessor is not bound to accept a tax-payer's valuation as correct, and if he does not he is not bound to give notice of a change in such valuation.....	202

NOTICE.—*Continued.*

PAGE.

purchaser at judicial sale is chargeable with notice of such material facts as are disclosed by the record.....	305
when a recorded copy of a foreign will does not operate as notice	461
a foreign will is not effective against purchasers without actual notice, where no exemplified or properly certified copy of the will has been recorded in Illinois.....	461
when record of mortgage is sufficiently certain to be constructive notice of the amount secured.....	553

OFFICERS.—See PUBLIC OFFICERS.

ORDINANCES.—See SPECIAL ASSESSMENTS.

section 18 of the Annexation act, preserving dram-shop ordinances of annexed territory, preserves in force all ordinances entitled "Dram-shops".....	257
section 18 of the Annexation act preserves in full force all of the Hyde Park liquor ordinances in force at the time the village of Hyde Park was annexed to Chicago.....	257
matters of description in special assessment ordinance are certain, in law, if they may be rendered certain by simple computation from data given.....	559

PARTIES.

guardian of insane defendant in separate maintenance may maintain cross-bill to annul the marriage on ground of mental incapacity of his ward to enter into marriage...	280
the State is an interested party in suits relating to the Illinois and Michigan canal.....	328
appeal lies to the Supreme Court if the State is interested, notwithstanding the provisions of section 8 of Appellate Court act as amended in 1887.....	328
when rule that the State cannot be made defendant to suit has no application.....	410
when guardian <i>ad litem</i> is properly appointed in suit concerning trust fund.....	598

PARTITION.

to sustain allowance of solicitors' fees as costs in partition the evidence must be preserved in the record, either by recitals in the decree or by certificate of evidence.....	461
under the statute concerning apportioning of complainant's solicitor's fee in partition, the good and substantial defense referred to need not necessarily be successful...	461

PARTNERSHIP.

false representation by partner as to firm's financial standing is within section 97 of Criminal Code.....	272
when purchase of stock is not a partnership affair....	357

PAYMENT.**PAGE.**

- when assignee of mortgage is protected against payments made by purchasers of the property to the mortgagee believing he still owned the mortgage..... 249

PERPETUITIES.

- when limitation over is void for remoteness..... 574

PHOTOGRAPHS.

- when photograph is properly denied admission in evidence. 340

PHYSICIANS.—See MEDICINE AND SURGERY.**PLEADING.**

- in action for damages for accidental death it is necessary to allege and prove that deceased left surviving a husband or wife or next of kin..... 94
- failure of original declaration to allege that deceased left a surviving husband or wife or next of kin cannot be remedied by amendment two years after the injury..... 94
- when defect in pleading is not cured by verdict..... 94
- it is competent for the court, in separate maintenance, to entertain a cross-bill to annul the marriage..... 280
- when rule that the State cannot be made defendant to suit has no application..... 410
- what matters need not be alleged in declaration in action for negligence in not furnishing sufficient help..... 439
- a demurrer admits facts which are well pleaded, but not the conclusions of law drawn therefrom by the pleader.. 484
- when cross-bill is unnecessary, in foreclosure, to enable the court to determine priority of liens and order distribution of proceeds..... 553
- bill of discovery in aid of a suit at law need not aver that the evidence desired is known only to the defendant.... 566

POWERS.

- when trustee under will has no power to mortgage 193

PRACTICE.—See APPEALS AND ERRORS.

- in tort, the court may enter judgment against one defendant and grant a new trial and permit dismissal as to the others, even though the verdict was against all..... 58
- proper method of objecting to testimony in deposition ... 58
- that the evidentiary facts in a case are agreed upon does not excuse Appellate Court from reciting the ultimate facts in its judgment, as required by the Practice act... 75
- facts need not be recited in Appellate Court's final judgment if the ultimate facts have been agreed upon..... 75

PRACTICE.—*Continued.*

PAGE.

pendency of suit for the use of one person is not ground for abating another suit on the same cause of action by same nominal plaintiff but for a different usee.....	155
if parties go to trial on plea in abatement, and the defendant is defeated, nothing remains to be done but to ascertain the amount which plaintiff is entitled to recover...	155
if the defendant is in default on all issues except a plea in abatement, on which he is defeated, he can only participate to the extent of reducing the plaintiff's recovery...	156
failure to enter a formal default as on partial defense is merely technical, and if an objection is not made in the trial court it cannot be raised on appeal.....	156
objections available at confirmation cannot be raised upon application for judgment of sale.....	171
peremptory instruction asked as one of the series submitting the case to the jury comes too late.....	241
effect of failure of writ of attachment to state its grounds.	246
what a proper examination of jurors upon their <i>voir dire</i> ..	340
no appeal lies from an order of a circuit judge refusing to dissolve an injunction in vacation.....	389
on affirming judgment awarding <i>mandamus</i> , Supreme Court need not fix date of return.	529
alleged errors not urged in motion for new trial are waived.	594
when guardian <i>ad litem</i> is properly appointed for minor defendants in suit involving trust fund	598
when priority in filing cross-bill does not secure preference.	598

PRESUMPTIONS.

a conveyance from husband to wife is presumed to be an advancement, and the burden is upon the grantor to prove the contrary.....	401
when presumption that the husband is the father of wife's children cannot prevail	424
when presumption that son destroyed evidence of advancements by his father cannot arise.....	628

PRINCIPAL AND AGENT.

when a contract between carriers as allied lines of transportation does not create the relation of agency.....	57
carrier receiving freight to be carried beyond its own line is the agent of the owner of the goods to make delivery to the connecting carrier.....	57
a carrier acting as agent for another carrier in handling shipments is liable to third persons for acts of misfeasance on the part of its own employees.	58
when mistake in billing is an act of misfeasance.....	58

PRINCIPAL AND AGENT. — <i>Continued.</i>	PAGE.
insurance agent's knowledge of the falsity of answers by the insured to questions contained in his application will permit a recovery on the policy.....	167
banker loaning money as agent for customer must use ordinary care common to bankers to guard against loaning to insolvent persons.....	382
when real estate broker is entitled to commission.....	645
PRIORITY.	
when priority in filing cross-bill does not secure preference.	598
PROMISSORY NOTES. —See BILLS AND NOTES.	
PUBLIC IMPROVEMENTS. —See SPECIAL ASSESSMENTS.	
when sewer ordinance is void for failure of description....	210
city cannot arbitrarily provide for putting in house connection slants, regardless of lot frontage.....	210
court of equity may control manner of performing work while it is in progress, in order to prevent any substantial departure from the terms of the ordinance	374
when objection that an improvement was not completed in accordance with terms of ordinance is not available....	374
limits of rule that objections to manner of completing improvement cannot be made on application for sale	375
honest fulfillment of public contract may be enforced, but it must be by a direct proceeding.. ..	375
essentials of confirmation petition under section 37 of the Local Improvement act of 1897.....	559
it is not for the jury to determine need of improvement...	559
PUBLIC OFFICERS.	
a township treasurer should keep books showing condition of his accounts, and in case of defalcation cannot insist that trustees be bound by expert's mistaken calculation.	457
sending by Governor of troops into a county in case of riot does not suspend power of sheriff to appoint deputies to aid in preserving the peace.....	484
under section 2 of the Mobs and Riots act of 1887, county is liable for subsistence of deputies while on duty, whether they provide subsistence at their homes or elsewhere....	484
eight-hour day law does not apply to services of an official character, such as those of deputy sheriffs appointed to preserve the peace in case of riot.....	484
acts of chief of police, based upon proceedings of council giving supposed authority therefor, are binding on city..	516
when re-instated municipal officer illegally dismissed under Civil Service act may compel city to pay his back salary.	516
the legal right to an office carries with it the right to the salary or emoluments of the office	516

QUO WARRANTO.**PAGE.**

- when information should not be deemed a private suit 493
- in *quo warranto* the burden is on the respondents to prove the legality of the acts complained of..... 493

RAILROADS.

- a railroad company operating its own line is liable to shippers for its own or its servants' negligence..... 57
- when contract between carriers as allied lines of transportation does not create the relation of agency.... 57
- carrier receiving freight to be carried beyond its own line is the agent of the owner of the goods to make delivery to the connecting carrier..... 57
- carrier acting as an agent for another carrier in handling shipments is liable to third parties for acts of misfeasance on the part of its own employees..... 58
- when mistake in billing is an act of misfeasance..... 58
- teamster having break-down on crossing has a right to try to save his property, if circumstances justify a reasonable belief that he can do so with safety..... 489
- what tends to show wantonness in management of train... 489
- an agreement to convey right of way to railroad company may be specifically enforced in a proper case..... 633
- what does not justify a refusal to convey right of way to a railroad company under a contract to convey..... 633
- a railroad company acquires the same rights under right of way contract as by condemnation..... 633

REAL PROPERTY.—See MORTGAGES; WILLS; DEEDS.

- when trustee under will has no power to mortgage..... 193
- when fee in trust property descends as intestate estate... 193
- devise construed as passing a base or determinable fee.... 574
- party voluntarily connecting with drainage ditch subjects only his own land to being taken into the district..... 623

RECORDING LAWS.

- release of trust deed by trustee without authority or payment does not discharge lien as between original parties nor as to subsequent purchasers with notice..... 174
- purchaser may rely upon public records in security, unless he is chargeable with notice of some title, claim or conveyance inconsistent therewith..... 174
- in absence of notice or ground of suspicion, a purchaser of property need not inquire whether note secured by trust deed released of record has been paid..... 174
- what not a circumstance to excite inquiry as to validity of release of trust deed..... 175
- when recorded copy of foreign will is not notice..... 461

RECORDING LAWS.—Continued.	PAGE.
a foreign will is not effective against purchasers without actual notice where no exemplified or properly certified copy of the will has been recorded in Illinois	461
when record of mortgage is sufficiently certain to be constructive notice of the amount secured.....	553
REDEMPTION.	
redemption by judgment creditor passes title to judgment debtor's property only, even though the mortgage covers other lots belonging to other parties.....	305
to entitle one to contribution for redemption the equities of the parties must be equal.....	305
when judgment creditor is not entitled to contribution for making redemption.....	305
RELEASE.—See MORTGAGES.	
RES JUDICATA.	
decree finding parties to be stockholders in a corporation is not <i>res judicata</i> , as to their status as stockholders, in a subsequent suit by different complainant... ..	128
REVENUE.—See TAXES.	
REWARD.	
terms of a reward must be substantially complied with by the claimant.....	610
what not a compliance with terms of reward.....	610
services must be performed with a view to the reward....	610
RIGHT OF WAY.—See RAILROADS.	
RIGHTS AND REMEDIES.—See ACTIONS AND DEFENSES.	
equity has no jurisdiction to enjoin collection of tax upon grounds which might properly have been made the basis of a proceeding at law by <i>mandamus</i>	84
applications to cancel deeds are subject to the maxim he who seeks equity must do equity.....	215
when deed should not be canceled without requiring complainant to refund consideration.	215
to justify termination of contract for default, the default need not be such as would defeat the whole purpose of the agreement.....	319
right to specific performance of contract is not absolute, as is the right to recover damages at law.....	328
a court of equity may control manner of performing public work while it is in progress, in order to prevent any substantial departure from terms of the ordinance.....	374

RIGHTS AND REMEDIES.— <i>Continued.</i>		PAGE.
honest fulfillment of public contract may be enforced, but it must be by a direct proceeding		375
right of interested parties to have benefit certificate reformed by the court.....		479
in absence of agreement for an eight-hour day no recovery can be had for overtime.....		484
a teamster having a break-down on railroad crossing has a right to try to save his property, if circumstances justify a reasonable belief that he can do so with safety.....		489

RIOTS.—See MOBS AND RIOTS.

SALARY.—See FEES AND SALARIES.

SALES.

purchaser of mortgaged property is not personally liable unless there is a contract, express or implied, to pay the mortgage debt or some part thereof.....	107
a promise to pay a mortgage debt is implied if amount of encumbrance is included in the purchase price and the purchaser retains that much of the purchase money....	107
an implied promise to pay a mortgage debt cannot exist where there is an express understanding to the contrary and a distinct refusal by the purchaser to pay it.....	107
a verbal promise to pay an existing mortgage debt as part of the consideration is valid, and may be enforced by the grantor or the holder of the mortgage.	161
grantee who, as part of the consideration, has assumed the mortgage debt, cannot dispute the consideration for the mortgage.....	161
purchaser may rely upon public records of title in security, unless he is chargeable with notice of some title, claim or conveyance inconsistent therewith.....	174
in absence of notice or ground of suspicion, a purchaser of property need not inquire whether note secured by trust deed released of record has been paid.....	174
what not a circumstance to excite inquiry as to validity of release of trust deed.....	175
when seller of orders issued to him by drainage commissioners for services is not liable to the buyer for amount paid.	186
seller of orders issued to him for services does not impliedly warrant that they are issued by authority of law nor that that they are worth what they represent	186
when purchase of stock is not a partnership affair.....	357

SANITARY DISTRICTS.

the contract of December 21, 1899, between the canal commissioners and the sanitary district, is not capable of being specifically enforced.....	326
--------------------------------------------------------------------------------------------------------------------------------------------------	-----

SEPARATE MAINTENANCE.

PAGE.

- guardian of an insane defendant in separate maintenance
may maintain a cross-bill to annul marriage on ground
of mental incapacity of his ward to enter into marriage. 280
- when court has jurisdiction to determine issue as to sanity
of defendant to separate maintenance suit. 280
- it is competent for the court, in a separate maintenance
proceeding, to entertain a cross-bill to annul marriage.. 280

SERVANTS.—See MASTER AND SERVANT; FELLOW-SERVANTS.**SETTLEMENT OF ESTATES.**

- section 70 of Administration act, providing that claims not
presented in two years shall be barred, explained. 356
- fact that suit is pending against party at time of his death
does not amount to an exhibition of the claim or demand
against the estate. 356
- effect where claim against estate is not of a character cog-
nizable by the county court. 356
- when claim is not a contingent one 356
- when decree allowing claim cannot be against inventoried
assets 356

SHERIFFS.

- sending by Governor of troops into a county in case of riot
does not suspend the power of sheriff to appoint deputies. 484
- county is liable for subsistence of each deputy appointed in
case of mob or riot while deputy is on duty, whether sub-
sistence is furnished for himself at his home or elsewhere. 484
- eight-hour day law does not apply to services of an official
character, such as those of deputy sheriffs appointed to
aid in preserving the peace. 484

SHIPPERS.—See CARRIERS.**SOLICITORS' FEES.**

- to sustain allowance of solicitors' fees as costs in partition
the evidence must be preserved in the record either by
recitals in decree or by certificate of evidence 461
- under the statute concerning apportioning of complain-
ant's solicitor's fee in partition, the good and substantial
defense mentioned need not necessarily be successful... 461

SPECIAL ASSESSMENTS.

- objections available at confirmation cannot be raised upon
application for judgment of sale. 171
- what not an available objection on application for sale.... 171
- when sewer ordinance is void for failure of description.... 210

SPECIAL ASSESSMENTS.— <i>Continued.</i>		PAGE
a city cannot arbitrarily provide for putting in house connection slants, regardless of lot frontage.....	210	
proper objections arising after judgment of confirmation may be made on application for judgment of sale.....	374	
a court of equity may control manner of performing work while it is in progress, to prevent any substantial departure from the terms of the ordinance.....	374	
when objection that an improvement was not completed in accordance with ordinance is not available.....	374	
limits of rule that objections to the manner of completing improvement cannot be made on application for sale....	375	
honest fulfillment of public contract may be enforced, but it must be by a direct proceeding.....	375	
matters of description in a special assessment ordinance are certain, in law, if they may be rendered certain by simple computation from data given.....	559	
essentials of confirmation petition under section 37 of the Local Improvement act of 1897.....	559	
it is not for jury to determine necessity for improvement.	559	

SPECIAL INTERROGATORIES.

when answer to special interrogatory is not objectionable, as relating to an evidentiary fact alone.....	382
----------------------------------------------------------------------------------------------------------	-----

SPECIFIC PERFORMANCE.

the right to specific performance is not absolute, as is the right to recover damages at law.....	326
a contract must be fair, equal and just to entitle party to have it specifically enforced.....	326
specific performance will not be decreed if a legal remedy is adequate.....	326
contract of December 21, 1899, between the canal commissioners and the sanitary district, is not capable of being specifically enforced.....	326
agreement to convey right of way to a railroad company may be specifically enforced in a proper case.....	633
what does not justify refusal to convey right of way.....	633

STATE BOARD OF HEALTH.

State Board of Health has no power to discipline holders of certificates to practice medicine, issued prior to July 1, 1899, nor to revoke such certificates.....	87
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

STATE BOARDS.—See MEDICINE AND SURGERY; BOARD OF EQUALIZATION.

STATUTE OF LIMITATIONS.—See LIMITATIONS.

STATUTES.—See CONSTITUTIONAL LAW; CONSTRUCTION.

- complete revision of subject matter repeals prior act.... 87
- act of 1899, regulating practice of medicine and surgery,
is the only one on the subject now in force..... 87
- statute should be construed so as to give effect to the main
intent, even though particular provisions are not con-
strued literally..... 257
- in construing a statute the court will have regard to ex-
isting circumstances or contemporaneous conditions.... 257

STIPULATIONS.—See AGREED FACTS.

STOCKHOLDERS.

- when former stockholders are not liable to creditors of a
corporation for unpaid balance on stock subscription... 128
- surrender of stock to a corporation is in effect a purchase
by it..... 128
- decree finding parties to be stockholders in a corporation
is not *res judicata* as to their status as stockholders in a
subsequent suit by a different complainant..... 128

STREET RAILWAYS.

- what evidence tends to establish case against street rail-
way company for backing a car against wagon in which
plaintiff was crossing tracks... 241

SURETIES.

- executor's bondsmen are not liable for his defaults in his
capacity as trustee or individually..... 497
- mere charge by an executor against himself, as such, does
not create a liability against his bondsmen..... 497

TAXES.—See SPECIAL ASSESSMENTS.

- equity has no jurisdiction to enjoin collection of tax upon
grounds which might properly have been made the basis
of a proceeding at law by *mandamus*..... 84
- objections available at confirmation cannot be raised upon
application for judgment of sale..... 171
- what not an available objection on application for sale... 171
- tax-payer is entitled to notice of change in assessment if
assessor accepts his schedule and valuation as correct.. 202
- the assessor is not bound to accept tax-payer's valuation as
correct, and if he does not he is not bound to give notice
of a change in such valuation..... 202
- when collection of tax will not be enjoined because of cler-
ical error in name of the corporation taxed..... 351
- the two per cent tax imposed by act of 1899 on the "gross
amount of premiums received" by foreign companies does
not apply to premiums refunded..... 410

TAXES.—*Continued.*

PAGE.

board of equalization acts as an original assessor of the capital stock and franchises of corporations.....	528
duty of assessing capital stock and franchises of corporations is mandatory, and its performance may be enforced by <i>mandamus</i> when omitted or evaded.....	528
an assessment of property for taxation may be impeached where it has fraudulently been fixed too low.....	528
when fraud by board of equalization in assessing capital stock of corporations, is established.....	528
rule for valuing capital stock and franchises.....	528
board of equalization has power to assess omitted property, when acting as an original assessor, notwithstanding the modification of section 276 of Revenue act by act of 1898.	528
adjournment of board of equalization pending application for <i>mandamus</i> does not deprive court of power to command it to re-convene and assess omitted property.....	529

TENANCY IN COMMON.

when a purchase of stock by partners is not a partnership affair but a case of tenancy in common.....	357
-------------------------------------------------------------------------------------------------------	-----

TOWNS.—See MUNICIPAL CORPORATIONS.

TOWNSHIP TREASURER.

township treasurer should keep books showing condition of his accounts, and in case of defalcation cannot insist that trustees be bound by expert's mistaken calculation.....	457
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----

TRIAL.

in tort, the court may enter judgment against one defendant and grant a new trial and permit a dismissal as to the others, even though the verdict was against all.....	58
proper method of objecting to testimony in deposition....	58
instructions should be clear and be applicable to evidence.	117
instructions which leave the questions of implied knowledge and authority to the jury are erroneous.....	137
if parties go to trial on plea in abatement and the defendant is defeated, nothing remains to be done but to ascertain the amount of the plaintiff's recovery.....	155
if the defendant is in default on all issues except a plea in abatement, on which he is defeated, he can only participate to the extent of reducing the plaintiff's recovery...	156
the failure to enter formal default as in partial defense is merely technical, and if an objection is not made in the trial court it cannot be raised on appeal.....	156
in action for negligence, if reasonable minds might draw different conclusions from the evidence the court should not take the case from the jury.....	236

TRIAL.—Continued.

PAGE.

whether danger was so imminent that an ordinarily prudent man would not have incurred it is a question of fact for the jury	236
peremptory instruction asked as one of the series submitting the case to the jury comes too late.	241
what a proper examination of jurors upon their <i>voir dire</i> ..	340
when answer to special interrogatory is not objectionable as relating to an evidentiary fact alone.	382
right of defendant to cross-examine complainant's witness to show ill-will or hostile feeling.....	450

TRUST DEEDS.—See MORTGAGES.

TRUSTS.

provision of will construed as creating a trust which is not defeated by fact the trustee is one of the beneficiaries..	193
when trustee under will has no power to mortgage.....	193
when fee in trust property descends as intestate estate...	193
when trustee is not chargeable with interest.	391
when mingling of trust funds with trustee's private funds does not create liability for interest.....	391
when executors of trustee are chargeable with interest for withholding the fund.....	391
equity will not compound interest on a trust fund except in cases of gross delinquency.....	391
when executor receives proceeds of insurance certificate as trustee and not as executor..	497
trustee cannot delegate active trust.....	598
section 49 of Chancery act does not prevent assignment of trust fund created by a third party.....	598
in absence of a restriction in will creating trust fund the <i>cestui que trust</i> may, in equity, assign the income as a security for his debt.....	598
when trust fund cannot be reached by creditor's bill.....	598
when guardian <i>ad litem</i> is properly appointed for minor defendants in suit involving trust fund.....	598

VERDICT.

when defect in pleading is not cured by verdict.....	94
------------------------------------------------------	----

VESTED RIGHTS.

beneficiary named in benefit certificate has ordinarily no vested right to the mortuary fund.....	365
when power of appointment by will, possessed by member of benefit society, cannot be taken away.....	365
it is only when a member of a benefit society expressly agrees to obey future changes in laws that he is bound by changes impairing the obligations of his contract....	365

VILLAGES.—See MUNICIPAL CORPORATIONS.

WAIVER.

PAGE.

alleged errors not urged in motion for new trial are waived. 594

WARRANTY.

seller of orders issued to him for services does not impliedly warrant that they are issued by authority of law nor that they are worth what they represent..... 186

when seller of orders issued to him by drainage commissioners for services is not liable to the buyer for amount paid. 186

WILLS.

if a will disposes of a fee, an appeal from an order of the circuit court refusing probate and dismissing the petition lies to the Supreme Court, as a freehold is involved. 97

intention of testatrix must be gathered from language used in the light of attending circumstances, and not from the testimony of a subscribing witness as to such intention.. 100

a stipulation of facts in a suit by husband of the testatrix against her minor heirs to construe the will, is not binding upon such heirs..... 100

construction which would render will inoperative should be avoided, if possible..... 100

language of will construed as passing life estate to the husband with remainder in fee simple to the heirs..... 103

provision of will construed as creating a trust which is not defeated because the trustee is one of the beneficiaries.. 193

when trustee under will has no power to mortgage..... 193

when fee in trust property descends as intestate estate... 193

when persons designated as "heirs-at-law" do not take *per stirpes*... .. 296

when recorded copy of foreign will is not notice..... 461

foreign will is not effective as against purchasers without actual notice where no exemplified or properly certified copy of will has been recorded in Illinois..... 461

rule where will is susceptible of two constructions..... 574

when limitation over is void for remoteness..... 574

devise construed as passing a base or determinable fee... 574

the fact that advancements were made, and the amounts thereof, must be established by extrinsic evidence, if the will leaves those matters uncertain..... 628

when declarations of testator as to advancements are inadmissible..... 628

when presumption that son destroyed evidence of advancements by his father cannot arise..... 628

whole will should be considered in determining the meaning of words used in a particular clause..... 651

language of will construed..... 651

WITNESSES.

PAGE.

- when instruction as to credibility of witness is proper..... 199
- when defendant in a partition suit by heirs against their ancestor's wife may testify under the third exception to section 2 of the Evidence act..... 450
- right of defendant to cross-examine complainant's witness to show ill-will or hostile feeling..... 450

WORDS AND PHRASES.

- construction of words in will devising property to the husband, "to have and to hold unto 'my' or our son's, his heirs and assigns forever"..... 100
- word "claim," as used in a deed of assignment of claims, and a bond as to their value, construed 181
- when persons designated in a will as "heirs-at-law" do not take *per stirpes*..... 296

WORK AND LABOR.

- eight-hour day law does not apply to services of an official character, such as those of deputy sheriffs appointed to preserve the peace in case of riot..... 484
- in absence of agreement for an eight-hour day no recovery can be had for overtime..... 484

TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR
EXPLAINED IN THIS VOLUME.

A	PAGE.
Abbott v. Rose, 62 Me. 194.....	145
Abney v. Kingsland, 10 Ala. 355.....	631
Adams & Westlake Manf. Co. v. Cook, 16 Ill. App. 161.....	73
Adams, County of, v. City of Quincy, 130 Ill. 566.....	562
Adlard v. Adlard, 65 Ill. 212.....	407
Albright v. McTighe, 49 Fed. Rep. 817.....	70
Alexander v. Northwestern Masonic Aid Ass. 126 Ill. 558.....	508
Allen v. Allen, 13 S. C. 512.....	302
Alling v. Wenzel, 133 Ill. 264.....	133
Alton, City of, v. Fishback, 181 Ill. 396.....	173
Alton, City of, v. Middleton's Heirs, 158 Ill. 442.....	214
American Bridge Works v. Pereira, 79 Ill. App. 90.....	344
American Express Co. v. Haggard, 37 Ill. 465.....	157
Anderson v. Chicago, Burl. and Quincy R. R. Co. 117 Ill. 26.....	266
Anderson v. Warne, 71 Ill. 20.....	146
Andrews v. Portland, 79 Me. 484.....	523
Aneals v. People, 134 Ill. 401.....	456
Angle v. Northwestern Mut. Life Ins. Co. 92 U. S. 340..148, 145, 142	
Armour v. Brazeau, 93 Ill. App. 235.....	127
Aurora and Geneva Ry. Co. v. Harvey, 178 Ill. 477.....	644
Ayers v. Widmayer, 188 Ill. 121.....	204

B	
Baker v. Railroad Co. 42 Ill. 73.....	73
Baldwin v. Begley, 185 Ill. 180.....	369, 368
Balkwill v. Bridgeport Wood Furnishing Co. 62 Ill. App. 663....	74
Banks v. City of Effingham, 63 Ill. App. 221.....	448
Barclay v. Barclay, 184 Ill. 375.....	423
Barron v. People, 73 Ill. 256.....	275, 274
Belden v. Woodmansee, 81 Ill. 25.....	73
Bickerdike v. City of Chicago, 185 Ill. 280.....	214
Blacklaws v. Milne, 82 Ill. 505.....	433
Blake v. Ferris, 5 N. Y. 48.....	68
Bloomington Mutual Benefit Ass. v. Blue, 120 Ill. 121.....	367
Blythe v. Ayers, 96 Cal. 532.....	434, 433
Boone v. Clark, 129 Ill. 466.....	558

	PAGE.
Booth v. Boston and Albany R. R. Co. 73 N. Y. 38.....	447
Boston v. Simmons, 150 Mass. 461.....	69
Boston and Maine R. R. Co. v. Babcock, 3 Cush. 228.....	636
Bostwick v. Skinner, 80 Ill. 147.....	294
Bowers v. Smith, 10 Paige, 133.....	580
Bowman v. People, 114 Ill. 474.....	96
Boyd v. Strahan, 36 Ill. 355.....	301
Boyd v. United States, 116 U. S. 746.....	570
Boynton v. People, 159 Ill. 553.....	379
Boynton v. Phelps, 52 Ill. 210.....	159
Bozarth v. Landers, 113 Ill. 181.....	222
Brewer v. Blougher, 9 Pet. 178.....	434
Brewer & Hofmann Brewing Co. v. Boddie, 162 Ill. 346.....	596
Brown v. Miner, 128 Ill. 148.....	290
Brown v. Westbrook, 27 Ga. 102.....	288
Brush v. Blanchard, 18 Ill. 46.....	163
Bryan v. Buckmaster, Breese, 408.....	267
Buehler v. McCormick, 169 Ill. 269.....	255, 252
Burgett v. Osborne, 172 Ill. 227.....	209
Burrows v. Klunk, 70 Md. 460.....	148, 142
Burwell v. Orr, 84 Ill. 465.....	142
Busenbark v. Saul, 184 Ill. 343.....	445
Butte v. Cunnyngname, 2 Russ. 279.....	317

C

Cairo, City of, v. Feuchter, 159 Ill. 155.....	270
Cairo and St. Louis R. R. Co. v. Holbrook, 72 Ill. 419.....	160
Callister v. Kochersperger, 168 Ill. 334.....	379
Camp v. Simpson, 118 Ill. 224.....	204
Carroll v. Carroll, 20 Tex. 731.....	433
Carter v. City of Chicago, 57 Ill. 283.....	174
Carterville Coal Co. v. Abbott, 181 Ill. 495.....	234
Cartwright v. Dickinson, 88 Tenn. 476.....	134
Cartwright v. McGown, 121 Ill. 388.....	435
Castner v. Walrod, 83 Ill. 171.....	267
Chaplin v. Comrs. of Highways, 126 Ill. 264.....	526
Charter v. Lane, 62 Conn. 121.....	631
C. and S. W. R. R. Co. v. Swinney, 38 Iowa, 182.....	636
Chicago and Alton R. R. Co. v. May, 108 Ill. 288.....	241
Chicago and Alton R. R. Co. v. O'Brien, 155 Ill. 630.....	449
Chicago, Burl. and Quincy R. R. Co. v. Cole, 75 Ill. 591.....	538
Chicago, Burl. and Quincy R. R. Co. v. Jones, 149 Ill. 361.....	95
Chicago, City of, v. Chicago and West. Ind. R. R. Co. 105 Ill. 73.	519
Chicago, City of, v. Law, 144 Ill. 569.....	336
Chicago City Ry. Co. v. Leach, 182 Ill. 359.....	95
Chicago Great Western Ry. Co. v. Mohan, 187 Ill. 281.....	243
Chicago, Milwaukee and St. P. R. R. Co. v. Dumsier, 109 Ill. 402.	93
Chicago and Rock Island R. R. Co. v. Morris, 26 Ill. 400.....	96

	PAGE.
Chicago, Rock Island and Pacific Ry. Co. v. Smith, 111 Ill. 363.	643
Chicago Terminal R. R. Co. v. Bugbee, 184 Ill. 353.	642
Church v. People, 174 Ill. 366.	381
Cincinnati, Hamilton and Dayton Ry. Co. v. Spratt, 2 Duv. 4.	66
Clay v. Hart, 7 Dana, 1.	513
Cleghorn v. Postelwaite, 43 Ill. 423.	204
Cole v. Chicago and Northwestern R. R. Co. 71 Wis. 114.	448
Commissioners of Highways v. Jackson, 165 Ill. 17.	540
Commonwealth v. Emigrant Indus. Sav. Bank, 98 Mass. 12.	143, 153
Commonwealth v. Gilson, 8 Watts, 214.	513
Comstock v. Brosseau, 65 Ill. 39.	515
Comstock v. Hannah, 76 Ill. 530.	150
Comstock v. Hitt, 37 Ill. 542.	111
Consolidated Coal Co. v. Haenni, 146 Ill. 614.	448
Consolidated Coal Co. v. Peers, 166 Ill. 361.	111
Consolidated Coal Co. v. Schaefer, 135 Ill. 210.	596
Consolidated Coal Co. v. Scheiber, 167 Ill. 539.	449
Conwell v. Springfield and Northwestern R. R. Co. 81 Ill. 232.	643
Cook v. Skelton, 20 Ill. 107.	160
Corgan v. Frew, 39 Ill. 31.	152
Covenant Mutual Benefit Ass. v. Hoffman, 110 Ill. 603.	508
Covenant Mutual Life Ass. v. Kentner, 188 Ill. 431.	369
Covenant Mutual Benefit Ass. v. Sears, 114 Ill. 108.	508
Coxe Bros. & Co. v. Salomon, 188 Ill. 571.	86
Crawford v. Nimmons, 180 Ill. 143.	111
Crump v. Morgan, 3 Ired. Eq. 91.	288
Cruse v. Aden, 127 Ill. 231.	267
Culver v. Third Nat. Bank, 64 Ill. 528.	91
Cumberland County v. Edwards, 76 Ill. 544.	460

D

Dallemand v. Saalfeldt, 175 Ill. 310.	235
Darling v. McDonald, 101 Ill. 370.	363, 362
Davis v. Taylor, 41 Ill. 405.	71
Davis Paint Co. v. Metzger Oil Co. 188 Ill. 295.	476
Dayton v. Drainage Comrs. 128 Ill. 271.	627
Dement v. Rokker, 126 Ill. 174.	332
Dennehy v. City of Chicago, 120 Ill. 627.	270
Devine v. Board of Comrs. 84 Ill. 590.	91
Dewey v. Chicago and Milwaukee Electric Ry. Co. 184 Ill. 426.	644
Dodge v. Cole, 97 Ill. 338.	204
Donlin v. Bradley, 119 Ill. 412.	407
Dorman v. Dorman, 187 Ill. 154.	407
Dorsey v. Smyth, 28 Cal. 21.	523
Dorsey v. Wolcott, 173 Ill. 539.	408
Dow v. Rattle, 12 Ill. 373.	71
Drury v. Holden, 121 Ill. 130.	255, 111
Duffin v. Abbott, 48 Ill. 17.	294

	PAGE.
Dugger v. Oglesby, 99 Ill. 405.....	363
Dunlap v. Allen, 90 Ill. 108.....	163
Dunlap, <i>In re</i> , L. R. Ch. Div. 583.....	317
Dunn v. Berkshire, 175 Ill. 243	476

E

Eldred v. Meek, 183 Ill. 26	586
Elzas v. Elzas, 171 Ill. 632.....	438
English v. Porter, 109 Ill. 285.....	452
Eylenfeldt v. Illinois Steel Co. 165 Ill. 185.....	95

F

Faloon v. McIntyre, 118 Ill. 292.....	163
Farwell v. Becker, 129 Ill. 261	373
Fent v. Toledo, Peoria and Warsaw Ry. Co. 59 Ill. 349.....	235
First Nat. Bank of Shawneetown v. Cook, 77 Ill. 622.....	204
Fischer v. Eslaman, 68 Ill. 78.....	315, 314, 313, 312
Fisher v. People, 157 Ill. 85	380, 379
Fitch v. Snedaker, 38 N. Y. 248.....	619, 616, 615
Fitzsimmons v. Brooklyn, 102 N. Y. 536.....	523
Flike v. Boston and Albany R. R. Co. 53 N. Y. 549.....	447
Fordyce v. Kosminski, 49 Ark. 42	148, 145
Foss v. City of Chicago, 184 Ill. 436.....	564
Fowler v. Fay, 62 Ill. 375.....	111
Francis v. Wilkinson, 147 Ill. 370.....	452
Freeman v. Auld, 44 N. Y. 50.....	166
Friedman v. Steiner, 107 Ill. 125	591
Frink v. Potter, 17 Ill. 406.....	73
Furman v. Parke, 21 N. J. L. 310.....	616, 615

G

Gage v. Perry, 93 Ill. 176.....	222
Garrard v. Haddan, 67 Pa. St. 82.....	153
Garrard v. Lewis, 10 Q. B. Div. 30	152
Gauch v. St. Louis Mutual Life Ins. Co. 88 Ill. 251	508
Gehrke v. Gehrke, 190 Ill. 166	476
Gitchell v. People, 146 Ill. 175	275, 274
Givins v. City of Chicago, 188 Ill. 348.....	562
Goelz v. Goelz, 157 Ill. 33.....	407
Golder v. Bressler, 105 Ill. 419	294
Goldie v. Werner, 151 Ill. 551.....	126
Goodman v. Simonds, 20 How. 343.....	151, 154
Gottschalk v. Smith, 156 Ill. 377.....	365
Gould v. Theological Seminary, 189 Ill. 282.....	99
Greenfield Savings Bank v. Stowell, 123 Mass. 198.....	149, 148, 146
Greve v. Goodson, 142 Ill. 355.....	390
Griffin v. Griffin, 125 Ill. 430.....	409
Grove v. Jeager, 60 Ill. 249.....	163
Guild v. Hull, 127 Ill. 523.....	452

H

PAGE.

Habberton v. Habberton, 156 Ill. 444.....	476
Hagenow v. People, 188 Ill. 545.....	275, 274
Hale v. Johnson, 80 Ill. 185.....	68
Hamilton v. Rathbone, 175 U. S. 421.....	271
Hammer v. Johnson, 44 Ill. 192.....	111
Hancock v. Peaty, 1 P. & D. L. R. 335.....	288
Harding v. Littledale, 150 Mass. 100.....	509
Harrison v. Owsley, 172 Ill. 629.....	580
Harrison v. Weatherby, 180 Ill. 418.....	475, 473
Hartwell v. DeVault, 159 Ill. 325.....	476
Harvey v. Aurora and Geneva Ry. Co. 174 Ill. 295.....	644
Harvey v. Smith, 55 Ill. 224.....	149, 148, 146
Hawbecker v. Hawbecker, 43 Md. 516.....	433
Hayden v. Wood, 16 Neb. 306.....	70
Heffner v. Moyst, 40 Ohio St. 112.....	70
Heinroth v. Kochersperger, 173 Ill. 205.....	379
Hill v. Harding, 93 Ill. 77.....	266
Hillyard v. Richardson, 3 Gray, 349.....	68
Hinds v. Hinds, 85 Ind. 312.....	514
Hines Lumber Co. v. Ligas, 172 Ill. 315.....	126
Hintz v. Graupner, 138 Ill. 158.....	596
Hobson v. Ewan, 62 Ill. 146.....	294
Hobson v. McCambridge, 130 Ill. 367.....	157
Hodge v. Gilman, 20 Ill. 437.....	154
Hogan v. Akin, 181 Ill. 448.....	267
Hogan v. Stophlet, 179 Ill. 150.....	616, 615
Hogeboom v. Hall, 24 Wend. 148.....	318
Holgate v. Broome, 8 Minn. 243.....	248
Hollen v. Davis, 59 Iowa, 444.....	153
Holmes v. Trumper, 22 Mich. 427.....	148
Horton v. Estate of Horton, 71 Iowa, 448.....	154, 153
Hortsman v. Covington, etc. R. R. Co. 18 B. Mon. 218.....	644
Houston v. Bruner, 39 Ind. 376.....	70
Howe v. Hodge, 152 Ill. 252.....	584
Howe v. Howe, 99 Mass. 88.....	452
Howe v. Medaris, 183 Ill. 288.....	126
Howlands v. Lounds, 51 N. Y. 604.....	620, 619
Hubbard v. Turner, 30 L. R. A. 593.....	508, 507
Hubbard, Price & Co. v. Turner, 93 Ga. 752.....	507
Huling v. Ehrich, 183 Ill. 315.....	204
Hurd v. Goodrich, 59 Ill. 450.....	399
Hurley v. Walton, 63 Ill. 280.....	365

I

Iago v. Iago, 168 Ill. 339.....	288
Illinois Central R. R. Co. v. Anderson, 184 Ill. 294.....	492
Illinois Central R. R. Co. v. Anderson, 73 Ill. App. 621.....	643

	PAGE.
Illinois Steel Co. v. Bauman, 178 Ill. 351.....	449
Illinois Steel Co. v. Schymanowski, 162 Ill. 447.....	239
Indiana v. Carr, 13 L. R. A. 177.....	523
Indianapolis and St. Louis R. R. Co. v. Hackethal, 72 Ill. 612..	73
Insurance Co. v. Railroad Co. 104 U. S. 146.....	66
Irvin v. Nashville, Chattanooga and St. Louis Ry. Co. 92 Ill. 103.	66
Ives v. McNicoll, 53 N. E. Rep. 60.....	433

J

Jenkins v. Pope, 93 Ill. 27.....	159, 158
Jenks v. Jackson, 127 Ill. 341.....	102
Johnson v. Carpenter, 7 Minn. 120.....	252
Johnson v. Thompson, 129 Mass. 398	166
Johnson Harvester Co. v. McLean, 57 Wis. 264.....	153, 152, 147
Johnston v. Johnston, 138 Ill. 385.....	407
Juniata County v. McDonald, 122 Pa. St. 115.....	617, 616

K

Kamp v. People, 141 Ill. 9.....	496
Kamphouse v. Gaffner, 73 Ill. 453.....	73
Kelgwin v. Drainage Comrs. 115 Ill. 347.....	355
Kelley v. Vigas, 112 Ill. 242.....	302, 301
Kelly v. Mann, 56 Iowa, 625.....	510
Kepperly v. Ramsden, 83 Ill. 354.....	68
Kerr v. Russell, 69 Ill. 666	409
Kinney v. People, 3 Scam. 357.....	460
Kipley v. Luthardt, 178 Ill. 525.....	521, 519
Knoxville Bank v. Clark, 51 Iowa, 264.....	148

L

Lake Erie and Western R. R. Co. v. Wilson, 189 Ill. 89.....	126
Lake Shore and Mich. Southern Ry. Co. v. Bodemer, 139 Ill. 596.	492
Lake Shore and Mich. Southern Ry. Co. v. Hessions, 150 Ill. 546.	96
Lake Shore and Mich. Southern Ry. Co. v. Richards, 152 Ill. 59.	324
Lalor v. Chicago, Burlington and Quincy R. R. Co. 52 Ill. 401..	448
Lamson v. Boyden, 160 Ill. 613.....	571
Lawrence v. Smith, 163 Ill. 149.....	584
Lawrence v. Yeatman, 2 Scam. 15.....	248
Lee v. Fletcher, 46 Minn. 49.....	70
Leopold v. Salkey, 189 Ill. 412.....	323
Lewis v. Barnhart, 145 U. S. 79	475, 473
Libby, McNeill & Libby v. Scherman, 146 Ill. 540.....	384
Littauer v. Goldman, 72 N. Y. 506	192, 190
Lombard v. Witbeck, 173 Ill. 396.....	592
Longwith v. Riggs, 123 Ill. 253..	481
Louisville, E. and St. L. Con. R. R. Co. v. Hawthorn, 147 Ill. 226.	449
Lowell v. Wren, 80 Ill. 238.....	409

	PAGE
Lusk v. Hotchkiss, 37 Conn. 219.....	488
Lyle v. Jacques, 101 Ill. 644.....	355

M

MacVeagh & Co. v. Roysten & Co. 172 Ill. 515.....	481
Mad River and L. E. R. Co. v. Barker, 8 Ohio St. 541.....	448
Maher v. City of Chicago, 38 Ill. 266.....	519
Mann v. Jummel, 183 Ill. 523.....	180
Mann v. Oriental Print Works, 11 R. I. 152.....	448
Market, etc. Nat. Bank v. Sargeant, 85 Me. 349.....	146
Marsh v. Davison, 9 Paige, 580.....	569
Martin v. Martin, 174 Ill. 371.....	631
Martin v. Stubbings, 126 Ill. 387.....	367
Martin v. Swift, 120 Ill. 488..	93
Matson v. Alley, 141 Ill. 284.....	151
McAuliffe v. Reuter, 166 Ill. 491.....	252
McCartney v. Osburn, 118 Ill. 403.....	302
McClure v. Johnson, 56 Iowa, 620.....	510
McConkey v. Smith, 73 Ill. 313.....	204
McDowell v. Stewart, 83 Ill. 538.....	409
McGrath v. Clark, 56 N. Y. 36.....	151
McGurn v. Board of Education, 133 Ill. 122.....	263
Meadowcroft v. People, 163 Ill. 56.....	276
Meek v. Allison, 67 Ill. 46.....	398
Meeker v. Meeker, 75 Ill. 260.....	452
Metheny v. Bohn, 164 Ill. 495.....	477, 476
Metropolitan West Side Elevated R. R. Co. v. Skola, 183 Ill. 454.....	241
Middleport, Town of, v. Aetna Life Ins. Co. 82 Ill. 562.....	572
Miller v. Miller, 16 Ill. 296.....	163
Miller v. Rice, 133 Ill. 315.....	638
Monmouth, City of, v. Popel, 183 Ill. 634.....	270
Moore v. Chicago Guaranty Fund Society, 178 Ill. 202.....	367
Moore v. Shurtleff, 128 Ill. 370.....	317
Morse v. Pacific Ry. Co. 191 Ill. 356.....	371
Moss v. Pacific R. R. Co. 49 Mo. 167.....	448
Muhlke v. Tiedemann, 177 Ill. 606.....	586
Munroe v. People, 102 Ill. 406.....	295

N

National Syrup Co. v. Carlson, 155 Ill. 210.....	239
Nevins v. City of Peoria, 41 Ill. 502.....	214
New Haven Clock Co. v. Kochersperger, 175 Ill. 383.....	86
Newman v. Willetts, 52 Ill. 98.....	475, 474
New York and Chicago Stock Exchange v. Gleason, 121 Ill. 502.....	355
Norris v. Crocker, 13 How. 438.....	91
North Chicago Street R. R. Co. v. Dudgeon, 184 Ill. 477.....	235
Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642.....	447
Norwich Bank v. Hyde, 13 Conn. 279.....	152

O

PAGE.

Offutt v. World's Columbian Exposition, 175 Ill. 472..	345, 241, 240,	239
Ogle v. Turpin, 102 Ill. 148.....		180
O'Hare v. Chicago, Madison and Northern R. R. Co. 139 Ill. 151.		344
Olds v. Cummings, 31 Ill. 188..		254, 252
Orchardson v. Coffield, 171 Ill. 14.....		288
Otis v. Cullum, 92 U. S. 447.....		192, 190
Ottawa Gas Light Co. v. Downey, 127 Ill. 201.:		93, 271
Ottawa, Oswego and Fox River V. Ry. Co. v. McMath, 91 Ill. 104.		596

P

Pace v. Pace, 19 Fla. 454.....		513
Pacific Hotel Co. v. Lieb, 83 Ill. 602.....		547, 537
Pahlman v. Taylor, 75 Ill. 629.		142, 155
Paving Co. v. Milford, 100 U. S. 147.....		374
Peacock v. Haven, 22 Ill. 23.....		364
Pells v. People, 159 Ill. 580.....		380
People v. Board of Education, 127 Ill. 613 ...		540
People v. City of Chicago, 152 Ill. 546		266
People v. City of Peoria, 166 Ill. 517		496
People v. Crabb, 156 Ill. 155.....		540
People v. Cregier, 138 Ill. 401.....		270, 267, 265, 263
People v. Green, 158 Ill. 594.....		380, 379
People v. Hoffman, 97 Ill. 234.....		266
People v. Huffman, 182 Ill. 390.....		514, 513
People v. Kipley, 171 Ill. 44.....		267
People v. Loeffler, 175 Ill. 585.....		520
People v. Markley, 166 Ill. 48.....		562
People v. Marshall, 1 Gilm. 672.....		267
People v. North Chicago Ry. Co. 88 Ill. 537.....		495
People v. Peacock, 98 Ill. 172.....		572, 93
People v. Phelps, 78 Ill. 147.....		509
People v. Salomon, 184 Ill. 490.....		294
People v. Sellars, 179 Ill. 170		542
People v. Supervisor, 100 Ill. 332.....		541
People v. Toomey, 122 Ill. 308.....		514
People v. Town of Mt. Morris, 137 Ill. 576.		540
People v. Town of Thornton, 186 Ill. 162.....		91
People v. Wren, 4 Scam. 269.....		266
People's Bank v. Kurtz, 99 Pa. St. 344.....		191, 190
Perry County v. Jefferson County, 94 Ill. 214.....		266
Peterson v. Railway Co. 70 Iowa, 92.....		66
Pfau v. Williamson, 63 Ill. 16.....		68
Phelps v. Illinois Central R. R. Co. 94 Ill. 548.....		95
Phenix v. Castner, 108 Ill. 207....		456
Phillips v. Christian County, 87 Ill. App. 481.....		488
Pidgeon v. School Trustees, 44 Ill. 501		166
Pittsburg Bridge Co. v. Walker, 170 Ill. 550.....		241, 240

	PAGE.
Pittsburg, Cincinnati and St. L. Ry. Co. v. Adams, 105 Ind. 152.	448
Pool v. Phillips, 167 Ill. 432.....	407
Port v. Port, 70 Ill. 484.....	438
Porter v. Rockford, R. I. and St. L. R. R. Co. 76 Ill. 561.....	547, 546
Pring v. South Branch Lumber Co. 20 Ill. App. 236.....	154
Pullman Palace Car Co. v. Laack, 143 Ill. 242.....	235
Purcell Co. v. Sage, 189 Ill. 79.....	78

Q

Quincy Coal Co. v. Hood, 77 Ill. 68.....	97, 96
------------------------------------------	--------

R

Rapp v. Stoner, 104 Ill. 618.....	111
Rasmussen v. Commissioners, 45 L. R. A. 295.....	523
Reitz v. People, 77 Ill. 518.....	248
Republic Life Ins. Co. v. Swigert, 135 Ill. 150.....	134
ReQua v. Graham, 187 Ill. 67.....	608
Richards v. Miller, 62 Ill. 417.....	301
Ricketts v. Village of Hyde Park, 85 Ill. 110.....	380
Riley v. Dickens, 19 Ill. 29.....	154, 152
Roberts v. Flatt, 142 Ill. 485.....	362
Robinson v. McNeill, 51 Ill. 225.....	191, 190
Robinson v. Millard, 133 Mass. 236.....	513
Roe v. Taylor, 45 Ill. 485.....	452
Ross v. Chicago, Burlington and Quincy R. R. Co. 77 Ill. 127...	636
Ross v. Payson, 160 Ill. 349.....	408
Rothschild v. Bruscke, 131 Ill. 265.....	159
Rue v. Dole, 107 Ill. 275.....	209

S

Safford v. Stubbs, 117 Ill. 389.....	475
Sams v. Sams, 85 Ky. 396.....	433
Sands v. Sands, 112 Ill. 225.....	408
Scammon v. City of Chicago, 25 Ill. 424.....	68
Schaefer v. Schaefer, 141 Ill. 337.....	103
Schnell v. City of Chicago, 38 Ill. 382.....	295, 294
Schofield, Estate of, 99 Ill. 513.....	398
Schrivver v. Hawkes, 22 Ohio St. 308.....	153
Scovill v. Miller, 140 Ill. 504.....	78
Security Trust Co. v. Tarpey, 182 Ill. 52.....	170
Seibel v. Vaughan, 69 Ill. 257.....	146
Selby v. Hutchinson, 4 Gilm. 319.....	323
Shaw v. Camp, 160 Ill. 425.....	163
Shepard v. National Bank, 67 Ill. 292.....	364
Shephard v. Carriel, 19 Ill. 313.....	475, 474
Shephard v. Rhodes, 60 Ill. 301.....	294
Shields v. Smith, 8 Bush. 601.....	513
Shreeves v. Allen, 79 Ill. 553.....	151
Shuey v. United States, 92 U. S. 73.....	617, 616

	PAGE.
<i>Sidwell v. Schumacher</i> , 99 Ill. 426.....	248
<i>Siegel v. People</i> , 106 Ill. 89.....	93
<i>Silverman v. Bullock</i> , 98 Ill. 11.....	255
<i>Smith v. Bell</i> , 6 Pet. 80.....	301
<i>Smith v. Covenant Mutual Benefit Ass.</i> 24 Ill. 685.....	508
<i>Smith v. Foster</i> , 3 Cold. 147.....	70
<i>Smith v. Graham</i> , 34 Mich. 305.....	166
<i>Smith v. New York, etc. R. R. Co.</i> 63 N. Y. 53.....	644
<i>Smith v. Robinson</i> , 11 Ill. 119.....	159
<i>Smith v. Smith</i> , 1 R. I. 398.....	153
<i>Smith v. Smith</i> , 144 Ill. 299.....	407
<i>Smith v. Smith</i> , 85 Ill. 189.....	407
<i>Smith v. Stevens</i> , 133 Ill. 183.....	552
<i>Snydacker v. Swan Land Co.</i> 154 Ill. 220.....	364
<i>Soles v. Sheppard</i> , 99 Ill. 616.....	558
<i>Spitler v. James</i> , 32 Ind. 202.....	151, 146
<i>Sprague v. National Bank of America</i> , 172 Ill. 149.....	359
<i>Stadler v. Detroit</i> , 13 Mich. 346.....	523
<i>Stainbrook v. Duncan</i> , 45 Ill. App. 344.....	69
<i>Stamper v. Temple</i> , 6 Humph. 113.....	619
<i>State Board of Health v. People</i> , 181 Ill. 512.....	571
<i>Stettauer v. Boldenweck</i> , 183 Ill. 187.....	374
<i>St. Louis Transfer Co. v. Canty</i> , 103 Ill. 423.....	526
<i>Stoltz v. Doering</i> , 112 Ill. 234.....	433
<i>Stone v. Clark's Admrs.</i> 40 Ill. 411.....	364
<i>Stone v. People</i> , 2 Scam. 326.....	274
<i>St. Paul Ry. Co. v. Phelps</i> , 137 U. S. 528.....	271
<i>Strong v. Loeffler</i> , 85 Ill. 73.....	191, 190
<i>Strubher v. Belsey</i> , 79 Ill. 307.....	580
<i>Sumner v. Sleeth</i> , 87 Ill. 500.....	159, 158
<i>Suppiger v. Gruaz</i> , 137 Ill. 216.....	364
<i>Supreme Lodge v. Knight</i> , 117 Ind. 489.....	369
<i>Sutphin v. Cox</i> , 1 West. Law Monthly, 346.....	433
<i>Svanoe v. Jurgens</i> , 144 Ill. 507.....	481
<i>Swift & Co. v. Rutkowski</i> , 182 Ill. 18.....	447, 235, 73, 72

T

<i>Taylor v. Sutton</i> , 15 Ga. 103.....	318
<i>Taylor v. Taylor</i> , 4 Gilm. 303.....	407
<i>Tedrick v. Wells</i> , 152 Ill. 214.....	157
<i>Terpenning v. Gallup</i> , 8 Iowa, 75.....	70
<i>Thomas v. People</i> , 107 Ill. 517.....	294
<i>Titcomb v. Vantyle</i> , 84 Ill. 371.....	452
<i>Titsworth v. Stout</i> , 49 Ill. 78.....	313
<i>Toledo, Wabash and Western Ry. Co. v. Black</i> , 88 Ill. 112.....	233
<i>Towner v. McClelland</i> , 110 Ill. 542.....	254, 252
<i>Turner v. Jenkins</i> , 79 Ill. 228.....	101
<i>Tyler v. Bailey</i> , 71 Ill. 34.....	191, 190

U

PAGE

Union Mutual Life Ins. Co. v. Stevens, 19 Fed. Rep. 671.....	509
United States v. Babbit, 1 Black, 55.....	267
United States v. Fisher, 2 Branch, 399.....	271
Unknown Heirs of Langworthy v. Baker, 23 Ill. 430.....	295

V

VanBuskirk v. VanBuskirk, 148 Ill. 9.....	407
Vennum v. Davis, 35 Ill. 568.....	569
Viriden, City of, v. Allan, 107 Ill. 505.....	528
Virgin v. Virgin, 189 Ill. 144.....	166
Vogle v. Brown, 120 Ill. 338.....	317
Voigt v. Kersten, 164 Ill. 314.....	481, 368, 367
Voris v. Renshaw, 49 Ill. 425.....	639

W

Wabash, St. Louis and Pacific Ry. Co. v. Binkert, 106 Ill. 298..	267
Wade v. Withington, 1 Allen, 561... ..	143
Walker v. Brown, 28 Ill. 378.....	112
Walters v. Short, 5 Gilm. 252.....	154
Warnecke v. Lembca, 71 Ill. 91.....	509
Warren v. Warren, 105 Ill. 568.....	163
Washington County v. Parlier, 5 Gilm. 232.....	460
Waymire v. Jutmore, 22 Ohio St. 271.....	288
Weaver v. Peasley & Co. 163 Ill. 251.....	248
Webber v. Clark, 136 Ill. 256.....	318
Weidman v. Symes, 120 Mich. 657.....	146
West Chicago Street R. R. Co. v. Krueger, 168 Ill. 586.....	596
Whipple v. Eddy, 161 Ill. 114.....	290
White v. Raymond, 188 Ill. 298.....	86
White v. Robinson, 50 Mich. 73.....	191, 190
White v. Ross, 160 Ill. 56.....	408
Whitman v. Fisher, 74 Ill. 147.....	580
Wight v. Wallbaum, 39 Ill. 554.....	294
Williams v. Evans, 154 Ill. 98.....	607
Williams v. People, 54 Ill. 422.....	274
Woods v. City of Chicago, 135 Ill. 582..	562
Woolfolk v. Bank, 10 Bush. 504.....	153
Worley v. Northwestern Masonic Aid. Ass. 10 Fed. Rep. 227.....	509, 508
Wormley v. Wormley, 98 Ill. 544.....	407
Wunderle v. Wunderle, 144 Ill. 40.....	271

Y

Yocum v. Smith, 63 Ill. 321.....	154, 149, 148, 147, 146
Young v. Grote, 4 Bing. 253.....	148
Young v. Ward, 21 Ill. 223.....	146

Z

Zimmerman v. Wead, 18 Ill. 304.....	157
-------------------------------------	-----

2, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

4/2. 37

15

